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## RIGHT OF TRIAL COURT TO SUSPEND CLERK INDICTED FOR SOME CRIMINAL OFFENSE WHILE INDICTMENT IS PENDING.

The recent case of State *ex rel* Henson v. Sheppard, 192 Mo. 499, raises some very interesting and unusual questions. It appeared from the evidence in this case that the relator, Hensen, a clerk of the court over which the respondent (Sheppard) presided, was indicted for murder and on motion of the state's attorney was removed from his office on the order of respondent. Relator sued out a writ of prohibition against the respondent and the Supreme Court of Missouri in making this writ absolute, held that a clerk, or any other elective officer, can only be removed from his office for misdemeanors which affect the performance of duties and then only after trial.

The court after reviewing the authorities, which hold that a public office is not property or a vested right, but rather "a public agency which, barring any constitutional inhibition, express or implied, may be abolished, curtailed or regulated by legislative enactment," proceeds to a very important limitation of the rule so announced, as follows: "Nevertheless, it does not follow because a public office created by law is not property in a precise sense, that a duly elected incumbent is at the whimsical sport of chance, caprice or of intermeddlers, or of any form of illegal and unauthorized interference. A privilege or status so conducive of longevity and delight that, once incumbents of office, 'few die and none resign' (See Jefferson's letter to Elias Shipman of New Haven, July 12, 1801, where the substance of this doctrine is announced), may not be held by a thread so slender and precarious. State v. Field, 37 Mo. App. 98. Speaking to the point in hand Judge Andrews in Nichols v. MacLean, 101 N. Y. 533, aptly says: 'But within these acknowledged limits, the right to an office carries with it the right to the emoluments of the office. An office has a pecuniary value, although primarily it is an agency for public purposes.' So that, given that one but 'reads his title clear,' to a public office he may not be rudely cast out from its *solatium*, its emoluments, except on due process of law. The undemocratic doctrine announced in the phrase, *sic volo, sic jubes, stet pro ratione voluntas*, is not applied by the courts of a free people. Dubuc v. Voss, 19 La. Ann. 210. * * * Both the letter and the *rationale* of the statute limit his right to suspend the clerk and oust him from all his duties to a case where the office has suffered; where the public have suffered, in that the incumbent has been an unfaithful servant in his office; has been guilty of a misdemeanor in office, or is charged with a misdemeanor in office; some official misconduct, misfeasance, nonfeasance or neglect of official duty."

More unprecedented was the action of the court in modifying the writ of prohibition to the extent of permitting the trial court to appoint a clerk *pro tempore* to discharge all the duties of clerk in relation to all proceedings growing out of the indictment of relator for murder. The principal and logical objection to this seemingly proper order of the court is the well established rule which the court recognized, that a clerk is a mere ministerial officer, and official acts of a mere ministerial character, performed by an interested party, are not, on that account alone, invalidated when assailed *ex post facto*. For instance, a clerk may issue process in his own behalf. Huff v. Shepard, 58 Mo. 1. See also Mutual Fire Ins. Co. v. Cummings, 11 Vt. 503; Evans v. Ethridge, 96 N. Car. 42. The court, however, admitting the correctness of the rule which validates the records written by a clerk in his own cause, nevertheless takes the bit into its teeth and refuses to allow the apparant logic of the situation to drive it into what it regarded as an absurdity. "Howbeit," says the court, after discussing the foregoing authorities, "it does not follow that a clerk of a court, charged with the heavy crime of murder in the first degree and arraigned in his own court, should be compelled to act as clerk at the trial of his own case, and ultimately sign, peradventure, his own death warrant. Such condition is abhorrent to right feeling, the fitness of things and the decencies of life, and ought not to be demanded nor tolerated by the law. Manifest scandals and misgivings would flow from such unseemli-

ness and indecency. Not alone because it would be unnatural and unmerciful to compel a man to act as clerk where his own life or death was trembling in the scales of justice, but poor human nature may well be deemed inadequate to resistance of the temptations incident to such opportunity. Deep and keen is the significance of the Master's formula 'Lead us not into temptation.' In the case the relator has the custody of his own indictment, his own recognizance—the evidence before the coroner and before the committing magistrate, and hovers over all process, entries and proceedings. It is a debt due to justice, *ex debitae justitiae* that this should not be. If there were no precedent for a *locum tenens*, a clerk for that term, we would make one. But there is a precedent (*Ex parte* Lehman, 60 Miss. 967) and that precedent will be followed. In that case the clerk was charged with forgery, and, as such clerk, he had charge of the record evidence of his forgery and offered to yield possession of his office so far as to permit its duties in relation to the indictments against himself to be discharged by another. The court below refused this offer and peremptorily suspended the clerk from every function and privilege of his office, depriving him of all its emoluments, and another person was appointed in his stead. Refusing to yield to this order, he was imprisoned as for contempt. Thereupon he sued out a writ of *habeas corpus* and it was held that he should be released, and that the court below erred in not accepting the offer of the defendant. * * * No man, says the wise Latin maxim, may act as a judge in his own case. And while in this case Henson is not the judge, yet his duties are those formerly performed by judges, and while not strictly judicial, they are so closely allied to judicial duties as to come somewhat within the mischief denounced by that controlling maxim."

## NOTES OF IMPORTANT DECISIONS.

WILLS—THE DOCTRINE OF ADVANCEMENT TO AN HEIR APPLIES ONLY IN CASE OF INTESTACY AND NOT TO A WILL.—An interesting question is to be found in the case of *In re* Hall's Estate Iowa), 110 N. W. Rep. 148, in relation to a will which provided as follows:

"2nd. I give and devise to the heirs (children) of my deceased son, Warren, the north half of the timber tract situated in the southeast quarter of the southwest quarter of section 28, township 86, range 6, in Linn county, Iowa, or proceeds of sale of said tract as they and my said executor may mutually agree.

3rd. I give, devise and bequeath to my son, Norman, the south half of said timber tract mentioned in number two as being situated in 28-86-6, Linn Co., Iowa, to have and to hold unto himself his heirs and assigns forever.

4th. I give and devise unto my sons, Isaac, Norman, Orin and Harmon, each an equal share in and to all the property, real and personal, of which I may die possessed, after the bequests hereinbefore and hereinafter mentioned, together with all debts and expenses, shall have been paid or set off, it being understood under this head that in the case of Norman the land devised him under number three above, is to be considered in the whole or aggregate of property to be equally, as to value, divided among the four legatees, he to have and to hold said land in any case, even though it be more than one-fourth of all property mentioned under this head, and should it be less than one-fourth, then balance is to be apportioned him by my said executor who is also to make all divisions under this head." The court said:

"These are clear and unambiguous; and the questions arising grow out of transactions arising after the execution of the will. It appears that thereafter, and before the death of the testator, he executed a deed to Norman Hall for the land devised by the third paragraph of the will, and took a receipt from him, Norman, for $625 as having received that much from his (Benjamin's) estate, on account of the land. The deed was taken to the recorder, but he would not file it for record because not acknowledged. The deed was returned to be corrected, and testator then changed his mind and concluded to deed the land to Margaret, wife of Norman, saying that he 'would know then that Norman would have a home.' The deed to Norman was then destroyed and the receipt given by him, Norman, was at testator's request returned and destroyed. Testator thereupon deeded the land by warranty deed to Margaret I. Hall for the expressed consideration of $625. This deed was executed December 25, 1901, and filed for record February 4, 1902. Testator died September 26, 1903. Norman Hall and his wife have been in possession of the land since the execution of the deed to Margaret. There is testimony tending to show that testator intended this land to be charged to Norman's share of the estate; but no showing that either Margaret accepted as such or that Norman agreed that it should be so treated.

The question presented is: Is Norman entitled to anything under the fourth clause of the will? He receives nothing under the third for the reason that the land was conveyed by the testator before his death to his (Norman's) wife. It is

not a case for application of the doctrine of advancement to one of the heirs, for the reason that it is not a case of intestacy. Gilmore v. Jenkins, 129 Iowa, 686, 106 N. W. Rep. 193; *In re* Lyons, 70 Iowa, 375, 30 N. W. Rep. 642; McCormick v. Hanks, 105 Iowa, 639, 75 N. W. Rep. 494; Spaan v. Anderson, 115 Iowa, 121, 88 N. W. Rep. 200. The only theory upon which the ruling of the trial court can be sustained is that by the deed to Margaret there was an ademption or satisfaction of the devise. Defendant's counsel contend that the doctrine of ademption does not apply to real estate; and that, if it does, it has no application where the conveyance is to some one other than the devisee, no matter how close the relationship. The doctrine of ademption, strictly speaking, applies only to personal property or to legacies; and a conveyance by the testator of real estate which he had already devised works a revocation rather than an ademption. Hattersley v. Bissett (N. J.), 29 Atl. Rep. 187, 40 Am. St. Rep. 532. But it seems there may be a satisfaction as distinguished from an ademption of legacies in order that one may not receive a double portion of the estate of an ancestor. Conceding *arguendo* that this rule applies to devisees of real estate, yet the conveyance must be to one standing *in loco parentis* and to the identical person named as devisee or legatee in the will. A voluntary conveyance or gift to the husband or wife of the devisee or legatee is not a satisfaction of the bequest or devise. Hart v. Johnson, 81 Ga. 734, 8 S. E. Rep. 73; *In re* Lyon, 70 Iowa, 375, 30 N. W. Rep. 642; Decrow v. Moody, 73 Me. 100; Marquise de Portes v. Hurlbert (N. J.), 14 Atl. Rep. 891; Kennedy v. Badgett (S. Car.), 2 S. E. Rep. 574. Of course, where testator conveys land already devised by him, the devise is adeemed, or, as some cases put it, there is a revocation of the will in so far as the specific devise is concerned. But the will still stands, and there is no satisfaction unless the conveyance be to the devisee. See cases hitherto cited.

These rules are so well settled that there is hardly a discordant note in the authorities regarding them. See as further sustaining them, Burnham v. Comfort (N. Y.), 15 N. E. Rep. 710, 2 Am. St. Rep. 462; Rains v. Hays, 40 Am. Rep. 39; *In re* Miller's Will (Iowa), 105 N. W. Rep. 105; Davis v. Close, 104 Iowa, 261, 73 N. W. Rep. 600. When the real estate specifically devised to Norman Hall was removed from the operation of the will by the conveyance to Margaret, the fourth paragraph of the will must be construed as if there had been no specific devise to Norman. Warren v. Taylor, 56 Iowa, 182, 9 N. W. Rep. 128; Ametrano v. Downs (N. Y.), 63 N. E. Rep. 340, 58 L. R. A. 719, 88 Am. St. Rep. 676; Emery v. Society (Me.), 9 Atl. Rep. 891; Morey v. Sohier, (N. H.), 3 Atl. Rep. 636, 56 Am. Rep. 548; *In re* Estate of Peet, 79 Iowa, 185, 44 N. W. Rep. 354. The conveyance to the wife of Norman was absolute, and it is not permissible to impose a parol trust thereon for the purpose of showing a satisfaction of the devise to Norman. Declarations of trust cannot be shown by parol. Testator did not stand *in loco parentis* toward Margaret Hall, and Norman derived no such benefit from the conveyance to her as that the devise to him should be treated as satisfied by ademption. Campbell v. Martin, 87 Ind. 577. While many cases are cited by appellee's counsel, none of them run counter to the rules here announced. The trial court was in error in construing the will. Norman Hall is entitled to his share of the estate under the fourth paragraph of the will, as he never received any part of the specific devise."

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PUNITIVE DAMAGES—WHERE THE EVIDENCE DISCLOSES A PROPER CASE THE AWARD OF PUNITIVE DAMAGES RESTS IN THE DISCRETION OF THE JURY.—The case of Sneve v. Lunder (Minn.), 110 N. W. Rep. 99, is one which presents a point which may often arise, and as the failure to properly instruct in the principal case, was made a ground for reversal, the case is one of interest particularly to those of our readers who are just beginning the practice. The question of punitive damages being one entirely in the discretion of the jury, the court may only instruct as to what circumstances are sufficient to allow the jury to consider such damages. In considering the matter the court said: "But the court instructed the jury as follows: 'The court in this case allows what is called punitive or exemplary damages; that is, allowed as punishment to the defendant for his conduct and in part to compensate the party. That is what is known as punitive or exemplary damages, and that is a proper item to consider in this case. This is not merely for compensatory damages, but the jury can allow that class of damages if it sees fit, but under no circumstances go beyond $3,000.' This was equivalent to telling the jury that the conduct of the defendant deserved punishment, and that, for such purpose, punitive damages must be allowed. Where the evidence discloses a proper case the awarding of punitive damages is a matter which is within the sound discretion of the jury, but the court has no right to direct that such damages shall be awarded in any case. It is the duty of the court to explain to the jury the meaning of punitive or exemplary damages and to state the circumstances and conditions under which such damages may be awarded, but it then rests with the jury to say whether, upon the evidence, punitive damages shall be awarded. In an action of this character the jury may, in its discretion, allow punitive damages if the evidence shows that the conduct of the defendant was wanton and ruthless and of such a character as to manifest an intention unnecessarily to wound her feelings, injure her reputation, and destroy her future prospects. Johnson v. Travis, 33 Minn. 231, 22 N. W. Rep. 624; Clement v. Brown, 57 Minn. 319, 59 N. W. Rep. 198; Tamke v. Vangsnes, 72 Minn. 236, 75 N. W. Rep. 217; Chellis v. Chap-

man, 125 N. Y. 214, 26 N. E. Rep. 308, 11 L. R. A. 784.

The respondent contends that the exception taken by the appellant to this portion of the charge was not broad enough to enable him to raise the question of the correctness of the charge in this court. The defendant in the court below excepted 'to that portion of the charge which allows punitive damages in the case under particular evidence in this case as it was charged.' The particular evidence in the case did not justify the court in directing the jury to allow punitive damages, and the fact that no additional or different evidence which could be produced would justify the instruction does not prevent the appellant from availing himself of the error under the exception."

## THEORY OF THE CASE—THE AMBULATORY RULE.

### SCOPE OF THIS ARGUMENT.

THIS DISCUSSION IS DESIGNED TO CONFUTE THE CLAIMS FOR A RATIONAL FOOTING AND THE DEFENSIBLE EXISTENCE OF THE "THEORY OF THE CASE" AS IT IS ADVOCATED AND APPLIED IN COLORADO, NEW YORK, INDIANA, ILLINOIS, MISSOURI AND MORE OR LESS DISCOVERABLE IN SOME OTHER STATES. THE AIM IS TO REVEAL THE "THEORY OF THE CASE" AS AN AMBULATORY RULE INCOMPATIBLE WITH THE VIEWS THAT PLEADINGS ARE, AMONG OTHER THINGS, TO LIMIT ISSUES AND TO NARROW PROOFS, ALSO THIS NECESSARY DEFINITIONS OF THEM: "PLEADINGS ARE THE EXCLUSIVE JURIDICAL MEANS OF INVESTING A COURT WITH JURISDICTION OF A SUBJECT MATTER TO ADJUDICATE IT." FROM FUNDAMENTAL VIEW POINTS THE FUNCTIONS OF PLEADINGS WILL BE SURVEYED AND DEFINED; IN RECKONINGS FROM SUCH DATUM POSTS SURROUNDING THE PRINCIPAL QUESTION INVOLVED IT WILL BE ATTEMPTED TO THROW A CONTINUOUS AND RESOLVING LIGHT UPON THE CLAIMS FOR THE AMBULATORY RULE; THUS ENABLING THE READER TO LOOK AND TO JUDGE. TO ENABLE HIM TO DO SO IMPORTANT RELATIONS BETWEEN PROCEDURE AND GOVERNMENT WILL BE MENTIONED; ALSO THAT PROCEDURE REFLECTS THE NATURE AND THE STRUCTURE OF GOVERNMENT; THAT THE STUDY OF PROCEDURE IS A STUDY OF GOVERNMENT; THAT THE RULES OF PROCEDURE ARE INTERACTIONS REQUIRED FOR THE APPLICATION OF PRINCIPLES OF GOVERNMENT IN THE DUE ADMINISTRATION OF THE LAWS WHICH REST UPON THE CONSERVING PRINCIPLES OF PROCEDURE. FROM THESE AS A GREAT CENTER AND FOUNTAIN ISSUE AND FLOW AN INFINITUDE OF RULES WHICH MAY BE PERCEIVED AS RECIPROCALS OR CORRELATIVES FROM THE REQUIREMENTS OF GOVERNMENT IN ITS OPERATIONS. THIS DEMONSTRATION WILL INVOLVE THE QUESTION OF WHETHER OR NOT THERE IS AN UNWRITTEN CONSTITUTION PARTS OF WHICH ARE FUNDAMENTAL MAXIMS REAFFIRMED THROUGHOUT THE CENTURIES ON DOWN TO US FROM ANTIQUITY. THAT THESE MAXIMS ARE NO LONGER STUDIED OR UNDERSTOOD AS FIRST CONCEIVED AND EXPRESSED. THESE MAXIMS WILL BE REFERRED TO AS DATUM POSTS OR "FIXED STARS" IN GOVERNMENT AND CONSTITUTIONAL PROCEDURE, WHATEVER MAY BE THEIR CHANGED AND VARIED EXPRESSIONS; THEREFROM WILL RESULT VIEWS TENDING TO SHOW THAT THE LAW IS AN ENTIRETY; THAT THE CLAIMS FOR SUPPOSED DISTINCTIONS BETWEEN ADJECTIVE AND SUBSTANTIVE LAW ARE UNTENABLE. THE ARGUMENT WILL INVOLVE OTHER LEADING AND DISTURBING QUESTIONS TO WHICH ATTENTION WILL BE DRAWN.

### DEFINITION.

The theory of the case may be defined for a multitude of jurisdictions as a rule of transcendent construction, permissive of gathering the facts of a case, not from their *datum post*, the "statement of a cause of action" in the right kind of pleading, filed at the right time and place with the clerk, but from all the proceedings, both at and after the hearing; also from the statutory record (bill of exceptions), if perchance an appellant wants it and further, succeeds in running the gauntlet of all the technical steps of its establishment of record. In other words the

gathering grounds of the matter of the "ambulatory" rule or theory is anything from anywhere, without any respect whatever to old and necessary landmarks, or the mandatory requirements of a constitutionalism, or of *stare decisis*. Warrant for all these propositions is found in the texts and decisions which will be referred to, permissive of the *ore tenus* establishment and proof of a judgment, including its foundation. The "ambulatory" rule is a doctrine incompatible with the old teaching that a "cause of action" should have and be moored to fixed *data* from which all reckonings, estimates, and conclusions relating to the conserving principles of procedure must ever be made. In discussing these propositions it seems necessary to refer to maxims and to ask for their patient consideration.

Viewed from the maxims the oldest and most firmly fixed *data* of the law, the "ambulatory" rule may properly be called by that name. By it most anything can for the occasion be established or overthrown. It might well be called the chameleon rule. It is here today and yonder tomorrow, like the Arab who folds his tent and as silently steals away. This rule never has had and it can not have a footing in a constitutionalism as will be perceived by reckonings from the *datum posts* of jurisprudence, some of which must be expressly mentioned for prominence for uses of this argument. Of these there are not really more than ten, but they are paraphrased so that there often appears more. The same rule is susceptible of wide and varied expression, as will appear.

To support the general proposition that there is an unwritten constitution, attention is drawn to the leading principles next enumerated, which are offered as fixed axiomatic and indisputable rules in the due administration of the laws. Therefore, it will be attempted to elucidate them as organic, as primal covenants of society, and equal in dignity and importance to any gathering of words in written constitutions. In relation to this proposition particular attention is invited to the first, second, fourth, fifth and sixth. They are offered as corner stones of juridical procedure. Whether they are or are not is for judgment.

1. *Frustra probatur quod probatum non relevat* (it is vain to prove what is not alleged); Fish v. Cleland (1864), 33 Ill. 237; Waugh v. Robbins, *Id.* 182; Bush v. Connelly, *Id.* 447; Lang v. Metzger, 206 Ill. 475; Israel v. Reynolds (1849), 13 Ill. 218; Simmons v. Jenkins (1875), 76 Ill. 479; Chitty v. R. R. (1896), 148 Mo. 64, 74, 75; Smith v. Burus (1891), 106 Mo. 94-106; Mallinckrodt, 169 Mo. 388. Cases from Colorado, Indiana and New York, Hughes' Procedure under Hume v. Robinson, Munday v. Vail, and "Theory of the Case," pp. 659, 762, 1223. From time immemorial it has been the rule that a party must prove his case as pleaded. But of late a new doctrine on this subject, a revolutionary doctrine, a doctrine that threatens the dismemberment of jurisprudence, and from some standpoints the foundation of government itself, has come to be recognized and countenanced as a permanent establishment, from a multitude of decisions. Under this new rule a party is no longer confined to the allegations, denials and issues presented by the pleadings, but may raise at the trial and enflesh with evidence, issues about which the pleadings are silent.

2. *De non apparentibus et non existentibus eadem est ratio* (a fact not made to juridically appear can not be judicially considered, or in other words, a fact not made to juridically appear, is presumed not to exist). United States v. Cruikshank (1875), 92 U. S. 542; Hughes' Procedure, Maxim No. 2, secs. 78-85, pp. 188-192, 562-565, 844-854.

3. That *allegata et probata* must correspond which is a corollary of *Frustra probatur quod probatum non relevat, supra.* Bristow v. Wright, Smith's Leading Cases, 8th. Ed.; Wabash R. R. v. Friedman, 146 Ill. 543; Eddy Co. v. Blackburn, 70 Fed. Rep. 949; Perry v. Porter, 124 Mass. 338; Hughes' Procedure, pp. 424, 792-793, 1080.

4. *Verba fortius accipiuntur Contra proferentem* (every presumption is to be made against a pleader). Dovaston v. Payne, Smith's Leading Cases; United States v. Cruikshank, *supra*; McCarty v. Hotel Co., 144 Mo. 397, 402; Hughes' Procedure, Maxim No. 19, secs. 215-222, pp. 307-312, 1256-1259. *Verba fortius*, etc., is not only a fixed star in the juridical heavens, but it is also one of the first magnitude. It is a rule of limitation and to make certain. Its operation is that, what is not stated does not exist; what ought to be of record must be proved by record and by the right record. What is not juridically presented can not be judicially considered. Its gathering grounds are domains of reason, logic, morals, mercy and protection. It governs the process and its return; the caption of the pleading, the statement of the wrong or the defense, the prayer, the judgment and the exercise of authority under it; it applies throughout appellate procedure. In the presentment of a case for review, what the records, the mandatory and the statutory records, do not affirmatively present is presumed not to exist; error must be affirmatively shown, and especially is this true in construing the statutory record; this record is surplusage except as error is assigned upon it; as to this record there is no error unless it is assigned; waiver of error is continuously sought, favored and declared, if consistent with the record. *Verba fortius*, etc., is strictly and technically applied in testing a record for *res adjudicata* purposes, or to show an estoppel of record, or to prove the title to property founded upon a judgment and its record.

5. *Expressio unius est exclusio alterius* (the express mention of one thing implies the exclusion of another). Hughes' Procedure, Maxim No. 16, secs. 182-202, pp. 286-298, 610.

6. "What ought to be of record must be proved by record and by the right record." This rule is a corollary of *De non apparentibus*, etc., *supra*. Hughes' Procedure, p. 14.

7. There shall be no departure.

8. Variances are opposed to essential certainty and protection.

9. The provisions of the code hereafter quoted and particularly the requirements that the statement shall set forth a "cause of action;" that filing an answer shall not waive this, and that all relief shall be within the facts stated. The significance of these various provisions are not appreciated by those who contend for the ambulatory rule. For if the complaint and its contents can not be waived by filing an answer, then when and where and how may that be waived? May not that defect be raised upon objections upon collateral attack, or when the record is offered to prove an estoppel or title to property founded on a judgment? O'Brien v. P., 216 Ill. 354, 363, 108 Am. St. Rep. 219; Franklin Union No. 4 v. P., 220 Ill. 355, 110 Am. St. Rep. 248, 4 L. R. A. (N. S.), 1001.

10. The general demurrer searches the whole record and attaches to the first fault, not to the second or later ones.

11. The ground of the general demurrer is never waived but may be first raised or renewed upon motion in arrest of judgment, or first raised or renewed upon collateral attack. What can not be waived "by filing an answer" can be raised on collateral attack. When this is perceived the code will no longer be viewed as a mystery. Then cases like Emerson v. Nash (1905), 124 Wis. 369, 109 Am. St. Rep. 944, 70 L. R. A. 326, 102 N. W. Rep. 921, will be seen to agree with Rushton v. Aspinall (Mansfield), Smith's Leading Cases, 8th Ed., reaffirmed by Kent in Bartlett v. Crozier (1820), 17 Johns. 448, 8 Am. Dec. 428. Emerson v. Nash is good law, is one of the ablest code cases by possibly the greatest living code expounder (Judge Marshall). However, we can not give assent to his statement in that decision that the code is a radical departure, and no longer respects the certainty essential for the conserving principles of procedure. Hughes' Procedure, p. 14, secs. 3, 4, *Id.* Judge Marshall's law is sound, but he overlooked the doctrine of the Rushton case, *supra*. Hughes' Procedure, pp. 728-731. In the light of such facts the reader can see that both Mansfield and Kent correctly asserted the basic principles of the code. Also that the denouncement of the maxims and cases reaffirming those as not defensible.

12. Consent can not confer jurisdiction of subject-matter. This is a corollary of 6th, 7th 8th and 9th rules, *supra*. Campbell v. Porter (1896), 162 U. S. 478; Perez v. Fernandez (1905), 201 U. S. 101; Windsor v. McVeigh (1876), 93 U. S. 274; Hughes' Procedure, p. 722.

13. The origin, history and functions of the mandatory record in a constitutionalism.

14. The origin, history and functions of the statutory record (bill of exceptions). And to which record applies *Expressio unius*, etc., *supra*.

15. A court is bound by its record and by the right record made to bind it by the parties filed with the clerk. This must be true in a constitutionalism, and wherever the division of state power is respected.

16. The code and practice acts specifically provide for the records last mentioned and above all other systems minutely and expressly provide for them and their respective functions. The ambulatory theory is opposed to the foregoing views.

This rule is a tremendously disturbing element of "American law" and as a transcendent rule of construction, which rule has been so applied by several courts as to change the nature and the structure of our constitutions. Life and death, health and sickness, are separated by nothing more than a film or a breath. And likewise law and anarchy, constitutionalism and absolutism, are separated by nothing more than a sheet of paper and the ceremonies of the division of state power. The "ambulatory" rule often appears as a rule of evidence, often a rule of pleading and often as a rule of practice. Accordingly it pervades and affects all procedure, and as we shall see, its influence flows through every vein and artery of government.

For brevity we shall call the theory of the case the "ambulatory rule," for this will prove a somewhat suggestive name for this amphibian, figuratively speaking, in procedure when we come to the inquiry as to which record, the mandatory record or the statutory record, supports that rule, which has so deeply eroded the fundamental principles of jurisprudence, and thereby not only wrecking for states what treasure cannot restore, but the juristic fame of great writers, judges and courts. This newcomer, this intruder, this disturber of American law has led high authorities to seriously maintain "that pleadings are of no more consequence than any other notice to a party, and therefore they may be waived like any other notice." They say, that the case arises from and is founded upon the evidence that "the jury find from the evidence and not from the pleadings."[1] The confusion resulting from the doctrine is also indicated, 2 Cyc. 691-692, cases; *Id.* 715; 12 *Id.* 372, 390; 16 *Id.* 403-406. Scores of pages therein can be cited *pro* and *con*. They present a maze of cases that is utterly bewildering. The law can not be determined from such a condition.

### MAXIMS AS DATUM POSTS.

An intelligent discussion of the doctrine in question requires a sufficiently minute description of its connected subjects. The importance of the matter in hand demands an

[1] 2 Thomp. Tri., 2310, 2311; Ell. App. Proc., 717; and Steph. Pl., sec. 230, 2d Ed. See cases cited Hughes' Proc., 29-32.

explicit statement of these cognate subjects, for a case well stated is more than half argued. Inseparable principles of the ambulatory rule are discussed in the maxims, *Omnia præsumuntur rite et solemniter esse acta* (all acts are presumed to be rightly, regularly and validly done); *Præsumator pro justitia sententiæ* (the justice of a sentence should be presumed); *Ut res magis valeat quam pereat* (it is better to conserve than to destroy); *Allegans contraria non est audiendus* (he who alleges contradictory things shall not be heard); *De non apparentibus et non existenibus eadem est ratio* (what is not made to juridically appear can not be judicially considered); *Frustra probatur quod probatum non relevat* (it is vain to prove what is not alleged); *Allegata et probatam* must correspond; *Verba fortius accipiuntur contra proferentum* (a pleading is construed most strongly against the pleader); and the basic rule of evidence, namely, "what ought to be of record must be proved by record and by the right record."

The foregoing canons have been the subject of lengthy discussions and the result has been a mystifying and befogging of the maxims and old cases affirming and elucidating them. A number of our courts have lost respect for the maxims of the law. They have come to the belief that old laws have passed away and that a new dispensation has dawned. Attractive and plausible errorists have not only been foremost in the eye of the profession, but they have its exclusive attention, and have flattered and soothed, and with a lullaby misled and deceived. They have wandered into labyrinths lighted only by the *ignis fatuus*. Warrant for these charges is to be found in the notes to Crepps v. Durden,[2] and Hahn v. Kelly.[3] In the last case the phrase "according to the due course of the common law" was denied any meaning whatever. This case is animadverted upon in Galpin v. Page,[4] where Justice Field was unable to speak with entire moderation, he defending the "due course of the common law" as one of the primal covenants of society.[5] This "theory of the case" rule is also at war with the maxim, *Concordare leyes legibus est optimus interpretandi modus* (to make laws agree with laws is the best mode of interpreting them). The disregard of this maxim results in contradictions too numerous to lay before the reader in this monograph.

There are several prevailing fallacies, which can be clearly detected and defined only by reckoning from the *datum posts*. One of these fallacies is the "ambulatory" rule; another is the illusory distinction between adjective and substantive law, the latter involving the question of the entirety of the law; another is that American jurisprudences have no unwritten constitutions; another is that there is a distinctively American law; another is that there are new principles of law; that the rudiments of the ancient and medieval law are not at present the fundamentals of the "modern," the "new," the "late," the "American," and the "enlightened jurisprudence;" that the knowledge of the "up to date," the "latest" law does not involve all that has long been established and known. But we have abandoned our heritage, and without guide or compass, have wandered into wildernesses of case law.

From *datum posts* the lawyer must start if he would unlock the philosophy of the law. He must know the technics of the law. These *datum posts* and technic marks are from antiquity and they are for eternity. They are clearly within the divine injunction: "Remove not the ancient landmarks which thy fathers have set."

At this juncture it is well to make mention of the relation of two maxims to the "ambulatory" rule. One of these is, *Ut res magis valeat quam pereat*, already mentioned, and the other is *Allegans contraria non est audiendus* (he who alleges contradictory things shall not be heard). The former is the limit of the liberal policy in construction. There is a liberal rule in pleading and construction and *Ut res magis valeat*

[2] Smith's Leading Cases.

[3] 94 Am. Dec. 742-770 ext. n.

[4] 3 Sawyer, 93.

[5] Justice Field knew the *datum posts* of the law and reasoned from them. He was a constitutional lawyer and a constitutional judge; he knew that constitutions are not of themselves the fundamental law of the land. He knew, that on the contrary, constitutions are to be read in the light of an unwritten constitution to be found in the great maxims of the law. We can find no trace of the "theory of the case" in the work of Field. He knew too well that no man can be brought into court without a writing, or be adjudged when in court except upon the charge as laid. If any reader wishes to judge whether Field saw the danger to a constitutional government in departing from the issues raised by the pleadings, let him read the case of Windsor v. McVeigh, decided by Justice Field

*quam pereat* (it is better to conserve than to destroy) expresses it fully; as it existed in the ancient law so it does in the modern and the latest "American," except where the "ambulatory" rule has been swirling around in its ebbs and flows. For this "ambulatory rule" has high-tide and ebb-tide in the courts that apply it as their decisions show. This rule of liberal construction however springs from waiver; which never supplies jurisdictional matter, as is sought to be done under the "ambulatory rule." The doctrine of waiver has a very strictly guarded application in criminal law, in equity, and under codes. To what extent it exists in the common law and so civil cases must be judged from Rushton v. Aspinall, and notes.[6] Mansfield denied the "ambulatory" rule in that case. It is discussed in the notes thereto under the name of "aider by verdict;" elsewhere it is often called "aider by pleading over." All these mean is that formal objections are waived if not aptly objected to. In a constitutionalism they cannot mean more, as we shall see. Those rules are reaffirmed by the code, wherein they mean no more than in Rushton v. Aspinall as we shall see.

The cases of Justice Field deserve the closest consideration, especially those relating to procedure and constitutional law. These cases will not lead to the belief that pleadings can be waived; that a court is not bound by its record, nor that a trial means a license to adjudicate upon anything and everything counsel may conjure. Many cases can be cited to show that a court is at liberty to embark upon an unchartered sea, without star, compass, or sextant, in Colorado, New York, Indiana, Illinois, and Missouri.[7] In other words, in some states the courts can be as rapacious and predacious as they choose; if they want, they can act as pirates; they can do as they please or as they are told. They can sail with letters of marque and reprisal. To what extent the beautiful language of plausible writers has obscured the *datum posts* of the law may be judged from the foregoing cases. They contain discussions of the "ambulatory rule" and its connected questions, which show the extent to which the profession has avoided the fountains and drifted down the rivulets, or, using another figure, how it permits courts to overlook the acorns and roots and to accept for fundamental reason nothing more than "nibbling at the buds."

[6] Smith's Leading Cases, 8th Ed.

[7] 8 Colo. App. 285-286, *Contra*, *Id.* 40. See Breeze v. Haley; Rensberger v. Britton; Russell v. Shurtleff; Hume v. Robinson; also Munday v. Vail, cases, Hughes' Procedure.

STATUTORY OR MANDATORY RECORD.

The "ambulatory rule" often arises in appellate procedure.[8] Now, in appellate procedure, there are often two records to be considered, though sometimes there is but one, as in Windsor v. McVeigh (U. S.). One of those records has a multitude of names; it is that record which is essential in all governmental operations to protect them from objections upon collateral attack; it is that record indispensable to evince the *coram judice* proceeding, and the absence or the insufficiency of which renders the proceedings *coram non judice*, or, in other words, a nullity, or a void and fruitless thing. This record embraces the writ, pleadings and judgment, and in a recent work on procedure is called the "mandatory" record in contradistinction to the bill of exceptions, which for brevity and antithetical suggestion, is defined as the "statutory" record.

The mandatory record is necessary to show and to prove the jurisdiction of the trial court and to impart constructive notice of its proceedings, and to resist objections upon collateral attack, among other things. The "statutory" record was first given by a statute in A. D. 1286, which has been re-enacted in all English-speaking jurisdictions. The "statutory" record is for an appellant in a court of errors only, and for no other use. It wholly depends on an assignment of errors, without which that record is vain and fruitless. Only for error assigned, precisely defined, on the statutory record will that record be opened or considered. Without an assignment of errors, defects in the statutory record are waived. It is otherwise with the mandatory record, errors upon which may be reached without a bill of exceptions, or without objections or exceptions made or noted or reserved.

The evil of the "theory of the case," or ambulatory rule, thus partially results from

[8] 8 Colo. App. 285-286. In this case the pleadings were departed from and the issues tried were injected into the case by the evidence.

the fact that it confuses the office of these fundamentally different records. It attempts to confer upon the bill of exceptions the function of the pleadings so that matter appearing in the bill of exceptions may be considered on appeal, irrespective of whether it appears in the pleadings, or within the issues raised by the pleadings. As a result the office of the record proper is destroyed, because a search of that record in its proper repository, the court, can no longer disclose whether the judgment is within the issues or not. The judgment may indeed be entirely unwarranted by the pleadings, but the searcher must, under the ambulatory rule, look to see what questions counsel asked at the trial before he can say whether the judgment is good or bad! This means that if no appeal has been taken, and bill of exceptions filed, the searcher must find the court stenographer and if possible learn from that personage what were the issues in the case. To such a drear and foreboding practice must we come under the "theory of the case" innovation. Well may such a rule be called "ambulatory," and so might be the unfortunate pursuer of the court stenographer. Yet the only alternative to this stenographer hunt is to hold that the "statutory" record cannot be looked to to uphold a judgment, or to resist objections upon collateral attack. This is a Scylla and Charybdis choice, but some of the courts sustaining the ambulatory rule have adopted the latter course, and so present to the world the spectacle of a judgment good against the appellant, but void as to all the rest of mankind.

The ambulatory rule is an unbridled thing and as such it may arise from either the mandatory or the statutory records. In this latpredicament are the states last mentioned, where this hybrid new-born rule has introduced a veritable Babel. It has filled them with antinomies. To illustrate: The cases in these states show that a record may be upheld and vindicated as *coram judice* on appeal, but the same record be vulnerable as *coram non judice* upon collateral attack. In other words, in these "ambulatory" states the statutory record is substituted for the "mandatory" record upon appeal, although when the same judgment is subjected to collateral attack the "statutory" cannot be so substituted for the "mandatory" record, because the *coram judice* proceeding upon collateral attack is held to depend wholly and exclusively upon the mandatory record. Or, the matter may be seen from this view-point. The new "American" doctrine admits a judgment to be good in appellate procedure, but declares it bad when it is offered to prove estoppel of record, or title to property founded upon that record. Now, a court stultifies itself when it declares the same record *coram judice* for one purpose and *coram non judice* for another purpose; such an attempted distinction is contrary to reason and to morals. The law does not tolerate absurdity for fear of the terrible consequences to which it leads: *Uno absurdo dato infinita sequuntur* (from one absurdity an infinity follow): it abhors a contradiction as it is said to abhor a title suspended *in nubibus*.

THE CLERK AS MASTER OF THE RECORD.

One of the consequences of this "theory of the case" rule is the breaking down of the constitutional division of state power. Our constitutions, both federal and state, recognize the office of clerk, just as they recognize the office of judge. He is often required to be elected by the people, and has cast upon him the duty of building up the record, by which, and by which only, the court can be known. The judge can no more usurp the function of the clerk, than he can usurp the function of the governor or of the legislator. The judge is not the court, he is but part of the court. The court is made up of judge, clerk and sheriff, assembled according to law and each performing his function as a distinct arm of the tribunal. When the judge undertakes to perform the duty of the clerk, by reciting in the court record the existence of jurisdictional facts, he is doing what the Star Chamber did in England, he is creating jurisdiction for himself, which in plain English, means he is creating an absolutism. In a constitutional government, jurisdiction depends upon facts, and the existence of those facts, it is the duty of the clerk to record. These facts are jurisdiction of the subject matter and of the parties, and an issue between the parties which the judge is to decide. It is only by the clerk that these facts can be made to appear to the court, it is only through the clerk that the issue can reach the court. Any other position leads to the "the-

ory of the case" rule, under which the judge is allowed to ignore the pleadings and frame up new issues at the trial. The "theory of the case" wipes the clerk out of existence. It destroys important sections in constitutions providing for clerks. We ask our readers in their respective states to consult their constitutions and then say whether a constitutional government can exist without a clerk. The Roman prætor would not have taken long to answer such a question. But we have forgotten the fountains and strayed down the rivulets. We are so busy hunting cases, we have no time to think of principles. *Melius petere fontes quam sectari rivulos.*

EXTENT AND EFFECT OF RULE.

The ambulatory rule was never given a footing in the civil law, or the English, or in New England or the Southern States, and (only to a very slight degree) in the federal courts. Its domain is in Colorado, New York, Illinois, Indiana and Missouri, though its foot-prints are found in states adjacent to those of the central group mentioned. Its presence is most notable in Colorado, wherein it is expressly held that the statutory record is the principal record and controlling record, and that it is such because it is made at or after the trial by the parties and the judge, and therefore the clerk's record, the mandatory record, is inconsequential. The clerk, a constitutional officer, and his record, is expressly construed out of the scheme of government. In other words, the ambulatory rule overrides the constitution and its establishment of the division of the state power. Accordingly, the judge takes the place of the clerk and is the "big" one. *In præsentia majoris cessat potentia minoris.* Illinois is not a code state, but like Massachusetts and Michigan, is a practice act state. It is a practice by Illinois, of Illinois, and for Illinois. This state and New York, are close after Colorado, in marking the high tide of the "ambulatory" rule.

Here it may be well to state that the code is not responsible for what has happened. Bacon was the first great national codifier; his 100 ordinances for the procedure of the high court of chancery have governed that court ever since; and the same practice governs equity procedure in the federal courts. David Dudley Field the author of the original American Code, merely re-expressed Bacon's ordinances in another language, and hence the code is founded on the equity system, the regulation of details may differ but the idea is the same. The nomenclature is changed but the spirit is from of old. Field said: "The Roman still holds dominion over this world by the silent empire of his law." This will be perceived upon a consideration of Paul's trial; one of the great principles therein discussed is found in sec. 10, Story's Pleading but in a different verbal setting. Therein were discussed *De non apparentibus et non existentibus eadem est ratio*, and *Frustra probatur quod probatum non relevat.* and "What ought to be of record must be proved by record and by the right record." From these principles and their cognates a constitutionalism can be evolved. They are parts of an unwritten constitution. They can not be departed from. They exist in every government of limited and defined powers. They can not be extirpated or abridged or impaired. They are the core, the heart and the vitals of a prescriptive constitution. These basic principles of a constitutionalism are at eternal war with arbitrariness in aid of which is now being enlisted this new and powerful ally, this "theory of the case" or "ambulatory" rule. As we shall see, it might well be called the mystic rule of arbitrariness and oppression, or the anti-constitutional rule, or the greatest disturber of the equilibrium of the division of state power, of due process of law, and of other conserving principles of the supreme law of the land; or the dispenser of those ceremonies that must precede the condemnation of life, liberty, and property in every government of defined and limited powers.

It is intellects that understand and rightly apply those principles that make a state. They made Rome grander and prouder and more fitted to rule, than did her armies and navies.

"Peace hath her victories not less renowned than war
Where the outlook is guided by a fixed star;
That leads a kindly light from chaos—shoals afar."

W. T. HUGHES.

## PAROL EVIDENCE TO SHOW WARRANTY.

### LOWER v. HICKMAN.

*Supreme Court of Arkansas, Nov. 12, 1906.*

Where a sale of a sawmill was evidenced by a complete written instrument, parol evidence was inadmissible to prove an oral warranty of the capacity of the mill.

A memorandum contained a list of items preliminary to a contract for the sale of a sawmill and appliances, and at the bottom of a statement that the capacity of the mill was 20,000 feet of lumber a day. The contract, when executed, contained everything in the memorandum except the capacity of the mill, and much more. Held, that it would be presumed that the parties did not intend to include in the contract any warranty of the capacity of the mill, and that it was, therefore, incompetent to show that the words on the memorandum imported such warranty.

HILL, C. J.: An examination of the rejected evidence, the memorandum alleged to have been signed by Hickman and the final contract signed by Lower and Gann, will show that two questions have arisen: (1) Was it competent to prove an oral warranty of the capacity of the sawmill? (2) Was it competent to prove that the words "sawmill cap. 20,000" on the memorandum meant a warranty that the sawmill had a capacity to cut 20,000 feet of lumber per day?

1. A warranty is so clearly a part of a sale that, where the sale is evidenced by a written instrument, it is incompetent to ingraft upon it a warranty proved by parol. The character of the written instrument is not important, so long as it purports to be a complete transaction of itself, and not a mere incomplete memorandum or receipt for money, or part of a transaction, where there are other parts of it other than warranties. It may be a complete contract, signed by both parties and comprehensive and exhaustive in detail, and contain many mutual agreements, terms, and stipulations, or it may be a simple bill of sale, or sale note evidencing the sale. The principle is the same in any of these transactions, and oral evidence of a warranty is almost universally excluded when a complete written instrument evidences the sale. It is not important that the instrument be signed by both parties; for acceptance of the other may be equally binding, and the principle here invoked is as often applied to unilateral as to bilateral instruments. For the statement of the principles involved, and the many applications thereof, see 4 Wigmore on Evidence, § 2434, and review in notes; 1 Elliott on Ev., §580; Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, 12 Sup. Ct. Rep. 46, 35 L. Ed. 837; Hanger v. Evins, 38 Ark. 339; Hooper v. Chism, 13 Ark. 496; Reed v. Wood, 9 Vt. 285; Naumberg v. Young, 44 N. J. Law, 331, 43 Am. Rep. 380; Diebold Safe & Lock Co. v. Huston, 55 Kan. 104, 39 Pac. Rep. 1035, 28 L. R. A. 53; Am. Mfg. Co. v. Klarquist, 47 Minn. 344, 50 N. W. Rep. 243; Miller v. Municipal E. L. & P. Co., 133 Mo. 205, 34 S. W. Rep. 585; McCray Ref., etc., Co. v. Woods, 99 Mich. 269, 58 N. W. Rep. 320, 41 Am. St. Rep. 599; Mast v. Pearce, 58 Iowa, 579, 8 N. W. Rep. 632, 12 N. W. Rep. 597, 43 Am. Rep. 125; Grand Ave. Hotel v. Wharton, 79 Fed. Rep. 45, 24 C. C. A. 441; Buckstaff v. Russell, 79 Fed. Rep. 611, 25 C. C. A. 129; Galpin v. Atwater, 29 Conn. 93. The application of these principles to the facts at bar cannot be better stated than in a similar case by Mr. Chief Justice Fuller: "Whether the written contract fully expressed the terms of the agreement was a question for the court, and since it was in this instance complete and perfect on its face, without ambiguity and embracing the whole subject-matter, it obviously could not be determined to be less comprehensive than it was." And this conclusion is unaffected by the fact that it did not allude to the capacity of the particular machine. To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question. Seitz v. Brewers' Ref. Co., 141 U. S. 510, 12 Sup. Ct. Rep. 46, 35 L. Ed. 837. The evidence attempting to prove by parol a warranty was properly rejected.

2. According to the evidence of Lower and Gann, Hickman made them a verbal proposition and put into writing a statement of what constituted the mill output, and at the bottom of this list of property is added "Sawmill cap. 20,000." This meant, according to their testimony, that the sawmill had a capacity to cut 20,000 feet of lumber per day. The contract signed by Lower and Gann shows it is a complete contract between the parties, embracing the subject-matter of their negotiations, except the capacity of the mill. The property listed in the memorandum is described with minuteness and detail, and not in general terms, as in the memorandum. The contract contains everything in the memorandum except the capacity, and much more. It stipulates terms and times of payment, the security for payment, a reservation of title, the rights of possession before and after default, and that in case of default in full payment the partial payments shall be considered rent. If the capacity of the mill had been omitted from the final contract by accident, mistake, or fraud, on proper proof, equity would grant relief. Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Goerke v. Rodgers, 75 Ark. 72, 86 S. W. Rep. 837; Mast v. Pearce, 58 Iowa, 579, 8 N. W. Rep. 632, 12 N. W. Rep. 597, 43 Am. Rep. 125; 4 Wigmore, Evidence, §§ 2413, 3416. Antecedent propositions, correspondence, prior writings, as well as oral statements and representations, are deemed to be merged into the written contract, which covers the subject-matter of such antecedent negotiation when it is free of ambiguity and complete. Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Richardson v. Comstock, 21 Ark. 69; McClurg v. Whitney, 82 Mo. App. 625; 17 Cyc. pp. 596, 598. There is nothing here to impeach the integrity of the final draft of the contract, and, as it em-

braced everything in the prior negotiations and memorandum except the capacity of the sawmill, it must be presumed that the parties did not intend to ingraft into the contract any warranty of the capacity of the mill, and it cannot be ingrafted upon it by parol.

The case was properly tried on the issue raised as to false representations, and in strict conformity to the last enunciation of this court upon that subject. La. Molasses Co. v. Ft. Smith Wholesale Gro. Co., 73 Ark. 542, 84 S. W. Rep. 1047.

Affirmed.

NOTE.—*A Sale Evidenced by a Complete Written Instrument May Not be Changed by Parol Evidence in an Action at Law Where There is no Ambiguity, but Equity May Reform it.*—The opinions of the Supreme Court of Arkansas reflect credit on the state. Going back to the Roman we find the opinion of the Arkansas Supreme Court expressed: "*Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba ficoda est.* In the absence of ambiguity no exposition shall be made which is opposed to the express words of the instrument." See Hughes on Procedure, Vol. 1, p. 319; Pyne v. Campbell, 6 El. & Bl. 370; Woolam v. Hearn, 7 Ves. Jun. 211; 2 Hughes' Proc. 751.

It is in the matter of procedure that lawyers so frequently fall down. It is reasonably certain that if anything were left out of a contract which was intended to have been put in it, a proceeding in equity to reform the instrument gives the broadest scope for the pleader. A party has an opportunity for a complete remedy, for if a court of equity having taken jurisdiction to reform a contract, finds the evidence sufficient for that purpose, it does not stop with the reformation, but proceeds to do complete justice by giving all the relief a suitor may show a right to, both in law and equity. Construction is the great thing to be attained; it lies above everything and the greatest lawyers and judges are those who are most apt in the matter of construction. A proceeding in equity affords the greatest opportunity for the use of rules of construction, because a common law proceeding deals with rigid rules of more universal application, so that the pleader is necessarily confined. The court has given a fine line of authorities to uphold its opinion, so that on the particular point decided we will offer but one citation relating most aptly to the question at issue in the principal case, which may be found in 23 Cent. L. J. 292. It is not a multitude of cases that impresses the really good judge, but the force and reason which may be found in the great cases, and the sooner the judges of our *misi prius* courts, as well as those of last resort, proceed to act upon this principle the better will it be for the force and effect of the administration of our laws which, in fact, is government.

As to the question when instruments may be reformed, a very valuable note may be found on the subject in 3 L. R. A. 190, in note to Rosenbaum Bro. v. Council Bluffs Ins. Co., which shows that "a writing not expressing the agreement as actually made, may be corrected without an allegation or proof of mutual mistake. Born v. Schrenkeisen, 110 N. Y. 55. A written contract which mistakes the terms of an oral agreement on which it is founded may be reformed. Hallam v. Corlett, 71 Iowa, 446. The same would be true of a written memoranda which was afterwards embodied in a written instrument which misstated what was intended to be embodied therein, the intention to do so being shown. "Where the minds of the parties have failed to meet on the same matters, or else the agreement or transaction is different with respect to its subject-matter, or terms from which it was intended, equity will grant relief." *Id.* citing Childers v. Childers, 1 De G. & J. 482; Cooper v. Joel, 1 De G., F. & J. 240; Bentley v. Mackay, 4 De G., F. & J. 279; Henkle v. Royal Exchange Assur. Co., 1 Ves. Sr. 317; Townshend v. Staugroom, 6 Ves. Jr. 328; Holmes v. Clark, 10 Iowa, 423; Jackson v. Andrews, 59 N. Y. 244; Nevins v. Dunlap, 33 N. Y. 676; Story v. Conger, 36 N. Y. 673; Welles v. Yates, 44 N. Y. 525; Diman v. Providence, W. & B. R. Co., 5 R. I. 130, 135; Sawyer v. Hovey, 3 Allen, 331; Woodbury Savings Bank & Bldg. Assn. v. Charter Oak F. & M. Ins. Co., 31 Conn. 517; Tesson v. Atlantic Mut. Ins. Co., 40 Mo. 33; 2 Pomeroy's Eq. Jur., 344. In such a case the instrument may be corrected so that it shall truly represent the agreement or transaction actually made or determined upon, according to the real purpose and intention of the parties. Baker v. Paine, 1 Ves. Sr. 456; White v. White, L. R. 15 Eq. 247; Bloomer v. Spittle, L. R. 13 Eq. 427; Mackenzie v. Coulson, L. R. 8 Eq. 368; Fowler v. Fowler, 4 De G. & J. 250; Rider v. Powell, 28 N. Y. 310; De Pyster v. Hasbruck, 11 N. Y. 582, and cases cited further in note, 3 L. R. A. 190. Also note to Page v. Higgins, 5 L. R. A. 156.

## JETSAM AND FLOTSAM.

### THE JURISDICTION OF THE FEDERAL COURTS IN CASES OF CONSPIRACY AGAINST PERSONS OF AFRICAN DESCENT.

On October 24, 1906, the Supreme Court of the United States filed an opinion in the case of Hodges v. United States, 203 U. S. 1, which can hardly fail to be of universal interest, especially in the southern sections of the country. In that case the court, in an opinion remarkable for its brevity, held, Harlan and Day, JJ., dissenting, that the federal courts have no jurisdiction under the 13th amendment or sections 1978, 1979, 5508, 5510, Revised Statutes, of a charge of conspiracy made and carried out in a state to prevent citizens of African descent, because of their race and color, from making or carrying out contracts and agreements to labor. That the federal courts had jurisdiction of actions of this class previous to the three *post bellum* amendments to the constitution can hardly be contended. With the exception of a very few restrictions such as the prohibition against *ex post facto* laws, bills of attainder, etc., the entire control over the privileges and immunities of the citizens was vested exclusively in the state legislatures. Carfield v. Coryell, 4 Wash. Cir. Ct. 371, 381. The federal government is one of enumerated powers. 10th amendment to the constiution. The 13th and 14th are universally conceded to be restraints on state action and not intended to furnish redress for the invasion of individual rights. United States v. Harris (1906), U. S. 313. The state alone has sovereignty and jurisdiction to protect personal liberty against lawless violence on the part of individuals. Cooley's Const. Lim. 706. Unless, therefore, the 13th amendment gives the federal courts jurisdiction over crimes of the character charged in Hodges v. The United States, it would seem that, of necessity, the remedy must be sought through the state courts subject to supervision by writs of error in proper cases. The question then

resolves itself into a determination of the scope of the 13th amendment. The national govenment has power, whether expressly given or not, to secure and protect rights conferred or guaranteed by the constitution. United States v. Reeves, 92 U. S. 214. Every right created by, arising under, or dependent upon, the constitution of the United States may be protected and enforced by congress in such manner as congress may, in its discretion, deem best adapted to the objects sought. Logan v. United States, 144 U. S. 293. Can it be correctly said, however, that a conspiracy to prevent citizens of African descent, because of their race and color, from making or carrying out contracts and agreements to labor is the deprivation of a right created by, or dependent upon, the 13th amendment? Or in other words, does such a conspiracy in its effect virtually amount to slavery and involuntary servitude? The solution of this question appears to be the point of dissension among the judges in this case.

Pomeroy in his work on Municipal Law, 660 p. 383, defines slavery as a status implying perpetual servitude to the master or owner upon whom it confers the complete control and dominion over the labor, acquisitions and person of the slave. Whether this definition is sufficiently comprehensive or not, we do not attempt to say. At any rate, it is sufficient for our purpose. While the inciting cause of the 13th amendment was the emancipation of the colored race, yet it was not an attempt to commit that race to the care of the nation. It reaches every race and equally forbids Mexican peonage and the Chinese coolie trade when they amount to involuntary servitude. Slaughterhouse Case, 16 Wall. 36. It must be borne in mind, however, that congress did not assume under the authority given by the 13th amendment to adjust what may be called the social rights of men in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship and the enjoyment or deprivation of which constitute the essential distinction between freedom and slavery. Civil Rights Cases, 109 U. S. 22.

The rights of citizens to pursue and follow any of the ordinary vocations of life are not created by the constitution, but are among the inherent and inalienable rights of men. Butcher's Union v. Crescent City Co., 111 U. S. 757; Civil Right Cases, 109 U. S. 3, 13. In the case of Logan v. United States, 144 U. S. 203, 293, the court held that the right to work at a given occupation, or particular calling, free from injury or interference by individual citizens was not a right guaranteed by the constitution. Where a state has been guilty of no violation of the 13th, 14th or 15th amendments no power is conferred on congress to punish private individuals who, acting without any authority from the state, and it may be defiance of law, invade the rights of the citizen protected by such amendments. Le Grand v. United States, 12 Fed. Rep. 577. Unless the state denies to persons of the colored race the equal protection of the laws, congress has no power to pass laws for the punishment of ordinary crimes and offenses against them. United States v. Cruikshank, 1 Wood, 308.

We fail to see therefore, how under circumstances such as these where the state has been guilty of no unjust discrimination against her colored citizens, but on the contrary is ready and willing to enforce the law and protect them in the exercise of their fundamental rights as citizens, the federal courts have any right to assume jurisdiction simply because the persons wronged happened to be of the African race. To hold otherwise would be in fact granting them privileges not secured to the white citizens who gave them their freedom and to invest the federal courts with jurisdiction over pratically the whole category of crimes when the victim happened to be a negro. Such a result was clearly not intended by the adoption of the 13th amendment of the constitution.—*Yale Law Journal.*

## CORRESPONDENCE.

### CIRCUMSTANTIAL EVIDENCE — APPEARANCES ARE OFTEN DECEPTIVE.

*Editor of the Central Law Journal:*

The following story is absolutely true, except the names used in designating the persons concerned, and is a good illustration of the saying, "appearances are often deceptive."

Many years ago, in a neighboring state, there lived two families in a neighborhood, whom we shall call Smith and Jones. The Jones family had a son about 21 years of age, who had for some reason or other, conceived a great disliking for Mr. Smith. The men had never gone further than to exchange angry words a couple of times. Finally Charlie Jones, the young man, left the country and was gone a couple of years. On his return he got off the train at "H," a town about 16 miles distant from his home, as that was the trading point for most of the people of his neighborhood. Soon after leaving the train he met his old enemy, Smith, on the street. To his surprise Smith seemed to have forgotten the old trouble and greeted him very cordially, inquiring where he had been, what he had been doing, how he was getting along, and finally told him he could ride out with him in his wagon if he did not find a wagon going nearer home. Charlie agreed to do so. During the afternoon Jones met and talked with several of the old neighbors, but as none of them were going any nearer to his home than Smith was, he waited and rode out with Smith. It was late in the evening when they left town, and as they had some sixteen miles to drive, it was after night when they reached the Smith farm. Smith invited Charlie to remain over night with him and told him that he could go on early in the morning. As it was Saturday night and he had not written his parents that he was coming, and it was still some two or three miles to his home, Jones finally agreed to stay over night. The team was cared for, the chores done, supper eaten and old neighbors and neighborhood gossip talked over until it was near midnight when the family retired. The next morning Smith arose and did his chores, while his wife prepared breakfast. When the meal was ready and Jones had not yet made his appearance, Smith went to the room to call his guest, but found the room empty. Just supposing that Charlie had gotten up and started early for his home, the family ate breakfast and began to get ready for Sunday school, at the school house in the district. Before they got started some neighbor boys, who had seen Charlie the day before in town, or had heard that he had come home, went to the Jones home to see him, and not finding him there, they came on over to Smith's, expecting to find him there yet. The surprise was great on both sides. Smith told his story straight enough, but what had become of Jones? They hunted all day, but not a trace of the missing man could be found. The excitement in the neighborhood was running high by night. People then recollected the old enmity between Jones and Smith, and at once a suspicion of foul play was aroused. People went to

the Smith farm and searched for evidence of the supposed murder. Smith protested his innocence and made no attempt to leave the neighborhood. No blood stains were found, nor any other evidences of any struggle. But people were not satisfied. Finally some wise one formulated the theory that the body had been burned and horrifying stories of how the body had been cut to pieces with a hatchet and burned in the cook stove at the Smith's home were afloat in the neighborhood; charred bones had been found in the ash heap, and the very wise were sure that they could positively identify them as human bones. Smith was arrested, charged with the murder and forced to stand trial for his life. His attorneys delayed the trial as long as possible, hoping some new evidence would come to light to prove the innocence of their client. When they could no longer stay the case, they went to trial. The state had a strong case. The motive for the murder was shown in the old grudge. The last seen of the missing man, he was in Smith's company. It was hardly possible that a young man who had been away from home for two years would come within three miles of home and then leave without going home, unless he were murdered. True, his body had not been found, but could easily have been made with in any one of half a dozen ways.

Smith protested his innocence but as he had no evidence to show what had become of his guest he was convicted of first degree murder and sentenced accordingly. His attorneys at once moved for a new trial and by some means it was granted. They insisted that in the absence of the body, no proof had been presented to show that a murder had actually been committed. Smith was kept in jail six months longer. His expenses soon ate up his property and he and his family were left absolutely destitute. The time for the re-hearing was approaching. The sober thought of the people was gradually doing its work and it looked as though Smith would be cleared when one day Mrs. Jones received a letter from Charlie. He was well and in a neighboring state. He explained his action by saying that after he retired that night at Smith's he thought of the plan for "getting even" with his old enemy, and got up and crawled out at the window in the night. He walked several miles away and took a train at a station where he was not known. He said he knew the vigilants were active and he had hoped they would hang Smith before he got any chance for a trial, but now that his plan had miscarried and Smith was bankrupt and had spent a year and a half in jail, and he and his family subjected to insult by everybody, and as they would now have to leave the country, he thought it was not necessary for him to keep still any longer. The letter was given to the county attorney who took steps to learn of its truthfulness. He was soon satisfied. The case was quashed and Smith discharged. No attempt was ever made to punish Jones for what he had done.

The question has often been asked, but never yet answered, "Why did the vigilants not hang Smith as Jones supposed and hoped they would do?" Perhaps some sharp-eyed night-rider knew more than he dared tell lest he betray his organizaton, but that may have been the way in which people finally came to the conclusion that no murder had been committed even before Jones' letter came to the public.

Kansas City, Kan. ALBERT STEWART.

[That such an incident could be even related as having really happened in this country, is indeed a slur on our judicial machinery. May it not be that the public condemnation of what is termed the "technicalities of the law" has led even the courts to adopt loose methods in the trial of criminal causes, forgetting what a large number of people have never understood that what are known as common law "technicalities" are in reality based on great principles of law established not only in the experience of the ages but written in the blood of martyred public servants who wrenched them from unwilling tyrants at the risk of their own lives. That any court, for instance, would permit a conviction without the clearest possible proof of the *corpus delicti* is incredible. It behooves us to get a little closer to general principles and to overcome the unfounded public disregard of the "technicalities" of the law. EDITOR.]

## BOOK REVIEWS.

### GREGORY'S FORMS OF COMMON LAW DECLARATIONS.

In the present time there is a tendency among some lawyers to be very lax in the construction of their pleadings, especially the petition, the very foundation of the cause of action and the most important constituent part of the mandatory record by which the entire cause of action is controlled both at the trial and on appeal, as well as on collateral attack. In justification of this tendency some lawyers point in defense to the decisions of certain courts detracting from the written pleadings their primal importance, courts which hold to what is termed as the "ambulatory rule," the theory of the case, insisting on giving to the bill of exceptions, the statutory record, greater importance, and holding that the issues may be shaped or reshaped at the trial, depending upon the theory upon which the case may be tried independent of the pleadings. That this position is indeed the grossest error, we could prove and may undertake to prove at some more convenient occasion, but we refer to the matter now to show that what might seem to justify laxness in pleading is a misconception, and that attorneys building thereon may be rudely awakened by some enlightened appellate justice who will give to pleadings their proper importance. In some states the courts are indeed very firm in adhering to principles which call for accuracy in the pleadings and who do not hesitate to throw a case out of court upon insufficient statement of the cause of action. Such a mishap is costly and lawyers will certainly welcome, we believe, a form book, giving in full, accurate forms for stating the declaration in any particular cause of action that may arise. Such a work we find in a new book, published by the author, entitled Forms of Common Law Declarations for Use in State and Federal Courts, by George C. Gregory of the Richmond, Virginia, bar.

Objection might be made here that any lawyer who knows the law should know how to state his cause of action. This objection is not well taken, as a glance at the reports of almost any of our state tribunals will show, since the best lawyers in the state often fall down on their pleadings. This arises very often from the fact that a lawyer with a large practice often waits until a few days before the last date for filing to the ensuing term, and then in his haste is not able to give to the statements of the causes of action which he files that degree of care which a less busily engaged practitioner gives to his first pleading. Objection might be further made that the local form books are more to be desired. This objection also is untenable, for the reason that local form

books, as far as our observation has gone, at least, deal, and rightly so, with such a vast multitude forms, that the delaration or petition is not given that prominence and detailed subdivision which is so necessary. Moreover, each state appellate court has not passed on every form of a declaration so that in making up a state form book, some of the forms are made up by the author from his own experience and have not the sanction of any court, while a national form book, as far as the declaration or first pleading is concerned, can easily present a form which has passed the scrutiny of one or two tribunals and one who relies upon it has, when such pleading is questioned in a higher court, the authorities which have sustained it right at his command.

Mr. Gregory's Common Law Declarations answers these two objections completely. To the busy practitioner they offer a complete form for almost every conceivable common law declaration. All the practitioner has to do is to change the characterization, the jurisdictions, the dates and the locations, and he has a petition that is iron-clad and will withstand the test of demurrer before trial, and a motion for judgment on the pleadings after trial and in argument before the supreme appellate tribunal. Especially in cases of attachment or injunction, where time is valuable such a form book is easily worth its actual weight in gold. This form book also gives to the practitioner forms absolutely tested and proven under fire. Under each form are given the authorities which sustain that particular form, at once giving the practitioner who uses it absolute confidence in his case. Moreover, Mr. Gregory has stated his forms in full with every possible detail, so that it is only necessary to omit that detail not included or necessary in the statement of any particular cause of action. Moreover, the subject matter of the various forms are subdivided with great particularity so as to suit almost any state of facts that would possibly arise. Thus take the subject of Warranty. Here we have four distinct declarations in full as follows: Declaration on a Guaranty; Declaration Upon Warranty of Chattel; Declaration on Deed Warranting Land; Declaration for Falsely Warranting Horse. Also under the subject heading of Account, we find three distinct declarations in full, to-wit: Declaration on Assigned Account; Declaration with Count of Account Stated; Declaration on Open Account. It is easy to conceive how it would be easy to change any one of these subdivisional forms to suit almost any statement of fact arising under these general headings. It is needless to state that the general subject of Common Carrier demands the largest variety of forms. Under this general heading there are fourteen general forms.

The work contains in all one hundred and nine common law declarations. It is prepared especially, according to the author's statement, for lawyers practicing in the common law states, but we believe that it will prove to be of great assistance to lawyers practicing in code states as well.

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## BOOKS RECEIVED.

The Act to Regulate Commerce (as amended) and acts supplementary thereto, indexed, digested and annotated, including the Carriers' Liability Act, Safety Appliance Acts, Act Requiring Reports of Accidents, Arbitration Act, Sherman Anti-Trust Act, and others. By Charles S. Hamlin, Esq., Corporation Counsel, Boston Chamber of Commerce; Member of Council and of Committee on Law of the National Board of Trade, etc., Boston. Little, Brown & Co., 1907. Buckram. Price $3.50. Review will follow.

## HUMOR OF THE LAW.

The late Judge Pettingill, of the Malden district court, concealed under an apparently stern exterior a kind heart, and nothing touched him so quickly as an unintentional witticism, especially if it were at the expense of the court.

One day a prisoner, arraigned before him for drunkenness and still under the influence of liquor, pleaded as hard as he could to be placed on probation.

"Why should I place you on probation?" said the judge, sternly. "Why, you're drunk now."

"No, I'm not, your honor," said the poor prisoner, earnestly. "I'm as sober as a judge."

He was placed on probation.—*Boston Herald.*

# WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**



1. ABDUCTION—Indictment.—An indictment charging the abduction of a child from the custody of its parents without their consent for the purposes of marriage is not insufficient as not showing to whom it was intended the child should be married.—State v. Sager, Minn., 108 N. W. Rep. 812.

2. ACKNOWLEDGMENT — Sufficiency. — To entitle a party to a correction of a defective certificate of acknowledgment of a married woman, he must plead a state of facts showing his right to it, as parol evidence that the officer complied with the law is not admissible.—Kopke v. Votaw, Tex., 95 S. W. Rep. 15.

3. ADVERSE POSSESSION—Computation of Time.—Where the successive adverse occupants hold in privity with each other, limitations may be computed by the last occupant from the date when the cause of action accrued against the first adverse possessor.—Nash v. Northwest Land Co., N. Dak., 108 N. W. Rep. 792.

4. ADVERSE POSSESSION—Statute of Limitation.—That a portion of the land in controversy was wholly inclosed by water barriers held not to deprive defendant's possession of its effect to confer title by adverse possession

under both the five and ten year statutes of limitations.—Loring v. Jackson, Tex., 95 S. W. Rep. 19.

5. ANIMALS—Sheep Killed by Dogs.—Gen. St. 1894, § 6882 (Rev. Laws 1905, § 2786), does not change the common-law rule that, where several dogs kill sheep and do other damage jointly, the owner of each dog is liable only for the damage done by his dog.—Nohre v. Wright, Minn., 108 N. W. Rep. 865.

6. APPEAL AND ERROR—Absence of Statement of Facts.—In an absence of a statement of facts, and where the judgment is authorized by the pleadings, rulings upon special exceptions in giving or refusing charges and in receiving or excluding evidence will not be reviewed.—Smith v. Pecos Valley & N. E. Ry. Co., Tex., 95 S. W. Rep. 11.

7. APPEAL AND ERROR—Custody of Child.—Where in *habeas corpus* for the possession of a child, the court held that the parties holding the child were not fit persons, but that the natural mother and her husband were, it justified an order awarding the child to such latter persons.—State v. Bryant, Minn., 108 N. W. Rep. 880.

8. APPEAL AND ERROR—Objections to Instructions.—Though a charge as to damages was inaccurate, where plaintiff failed to call attention to the points objected to, he cannot on appeal complain of unintentional misstatements and verbal errors.—Kolbe v. Boyle, Minn., 108 N. W. Rep. 847.

9. ARBITRATION AND AWARD—Common-Law Award.—A judgment entered upon motion upon an award which is invalid as a statutory award cannot be sustained upon the ground that it is sufficient as a common-law award.—Gessner v. Minneapolis, St. P. & S. S. M. Ry. Co., N. Dak., 108 N. W. Rep. 786.

10. ARREST—Right to Arrest Without Warrant.—A policeman of a town has a right to arrest persons for violations of the ordinances without warrant, if the offense was committed in his presence. — Hammond v. State, Ala., 41 So. Rep. 761.

11. ARREST—Suspicious Actions.—A police officer has no right to arrest a person because acting in a suspicious manner.—Phillips v. Leary, 100 N. Y. Supp. 200.

12. ATTORNEY AND CLIENT—Employment.—In an action against a town for services in defending an action brought against members of a school committee, facts held sufficient to show an obligation on the part of the town by estoppel or ratification.—Newton v. Town of Hamden, Conn., 64 Atl. Rep. 229.

13. ATTACHMENT—Trusts.—Where a debtor held the title to certain real estate as a resulting trustee of a portion thereof for plaintiff, an attaching creditor acquired by his attachment only the rights of the debtor in the property.—Waterman v. Buckingham, Conn., 64 Atl. Rep. 212.

14. BAILMENT—Title.—Where the bailee of a safe transferred the same to a corporation organized by it, and the corporation sold it to defendant, neither the corporation nor defendant acquired any better title than their respective sellers had.—Woodward v. San Antonio Traction Co., Tex., 95 S. W. Rep. 76.

15. BANKRUPTCY—Discharge.—An action to enforce an obligation barred by a discharge in bankruptcy, based on a subsequent promise to pay, must fail unless there be strong proof as to the debt and as to an unconditional promise to pay.—Pearsall v. Tabour, Minn., 108 N. W. Rep. 808.

16. BASTARDS—Right to Custody.—As against any person except the putative father, the mother of a natural child has the natural right to its custody.—Hesselman v. Haas, N. J., 64 Atl. Rep. 165.

17. BENEFIT SOCIETIES—Effect of Nonpayment of Assessment.—A member of a fraternal benefit society held not saved from the penalty of suspension for nonpayment of assessments within the time prescribed by the laws of the society.—Coughlin v. Knights of Columbus, Conn., 64 Atl. Rep. 223.

18. BILLS AND NOTES—Consideration.—In an action on a note, the evidence held sufficient to show that the note was executed by defendant to indemnify plaintiff against having to pay another note made by defendant.—Lovell & Co. v. Sneed, Ark., 95 S. W. Rep. 157.

19. BILLS AND NOTES—Consideration.—A third person giving a check to discharge a note secured by a mortgage held not entitled to repudiate the check on the ground that the note had not been indorsed to the holder by the payee.—National Bank of Newbury v. Sayer, N. H., 64 Atl. Rep. 189.

20. BROKERS—Implied Contract.—In an action for broker's services on an implied contract, it is only necessary for plaintiff to show that he performed acts as the broker of the seller, and that the latter accepted his agency and adopted his acts.—Ross v. Moskowitz, Tex., 95 S. W. Rep. 86.

21. CANCELLATION OF INSTRUMENTS—Deeds.—In a suit to set aside a deed executed by an aged couple in consideration of the grantee therein supporting them for life, a certain statement made by the grantee held not inconsistent with the existence of the deed.—Lewis v. Wilcox, Iowa, 108 N. W. Rep. 536.

22. CANCELLATION OF INSTRUMENTS—Grounds.—Where a party to a contract sues to cancel it on the ground that another has refused to perform, he must stand on the contract as he executed it.—Lockwood v. Geier, Minn., 108 N. W. Rep. 877.

23. CANCELLATION OF INSTRUMENTS—Mental Capacity.—In a suit to set aside a deed on the ground of mental incompetency of grantor, that the primary purpose of the deed was to pass title to all of the grantor's realty to his wife raised no presumption of his incapacity.—Chadwell v. Reed, Mo., 95 S. W. Rep. 227.

24. CARRIERS—Defective Condition of Waiting Place.—In an action against a street railway company for injuries caused by a defect in a waiting place for passengers, certain evidence held admissible to show want of care in not repairing the defect.—Haskell v. Manchester St. Ry., N. H., 64 Atl. Rep. 186.

25. CARRIERS—Payment of Fare to Avoid Ejection.—Where a passenger tendered the lawful fare, he was under no duty to pay additional fare unlawfully demanded, or to get off the train at an intermediate station and buy a ticket, to reduce the damages resulting from his ejection.—Gulf, C. & S. F. Ry. Co. v. Dyer, Tex., 95 S. W. Rep. 12.

26. CARRIERS—Warehouseman.—A common carrier's liability as such for loss of goods ends, and its liability as a warehouseman begins, on the arrival of the goods at destination without notice to the consignee or an opportunity to remove them.—Hicks v. Wabash R. Co., Iowa, 108 N. W. Rep. 584.

27. CHATTEL MORTGAGES—Future Advances.—A chattel mortgage to secure future advances held extinguished on full payment of such advances as were within the contemplation of the parties.—Wright v. Voorhees, Iowa, 108 N. W. Rep. 758.

28. CHATTEL MORTGAGES—Title of Mortgagor.—A lessee of a farm on shares held to possess an equitable interest in a crop raised entitling him to mortgage the same, notwithstanding the terms of the lease.—Lyon v. Phillips, S. Dak., 108 N. W. Rep. 554.

29. COMPROMISE AND SETTLEMENT—Items Included.—Where dividend claimed by plaintiff was shown to have been included in settlement between parties, court should have instructed that burden was on plaintiff to rebut the showing that it was included.—Simpson v. Thompson, Tex., 95 S. W. Rep. 94.

30. CONSTITUTIONAL LAW—Vested Rights.—The statute under which a gas company was organized held not to give it a vested right to charge such rates as to pay the perpetuity returns on the original capitalization without regard to depreciation in value of property.—*In re* Rebecchi, 100 N. Y. Supp. 335.

31. CONTEMPT—Punishment.—Rev. Laws 1905, § 4640, limits the power of a court to punish for a constructive contempt to a fine not exceeding $50 unless the right of a party to an action or special proceeding was defeated

or prejudiced thereby.—State v. Miesen, Minn., 108 N. W. Rep. 513.

32. CONTRACTS—Consideration.—A finding that a husband promised to pay $75 for the release of his contract to sell the homestead, which contract had not been joined in by his wife, held not to show a dispute constituting a sufficient consideration for the promise.—Silander v. Gronna, N. Dak., 108 N. W. Rep. 544.

33. CONTRACTS—Duress.—One who by duress is compelled to sign a contract, parting with his property, may proceed in equity for a rescission, rescind by his own act, and sue at law, or allow the contract to stand and sue for damages.—Neibuhr v. Gage, Minn., 108 N. W. Rep. 884.

34. CONTRACTS—Nominal Consideration.—Recital of a consideration of one dollar in an oil and gas lease and payment thereof held not sufficient consideration to support the contract.—Great Western Oil Co. v. Carpenter, Tex., 95 S. W. Rep. 57.

35. CORPORATIONS—Right to Assess Full Paid Stockholders.—Domestic corporations held authorized to assess full paid stockholders to satisfy claims for which shareholders were individually liable.—Carter, Rice & Co. v. Samuel Hano Co., N. H., 64 Atl. Rep. 201.

36. COURTS—Jurisdiction of Probate Court.—Where the parties to a partition claimed under a will, and their only interest was a distributive share of the proceeds of the sale of the property, the probate court had no jurisdiction in statutory partition to adjust such rights.—Greer v. Herren, Ala., 41 So. Rep. 783.

37. COURTS—Rule of Property.—A decision that a city was the owner of property dedicated to it and had the right to make any disposition of it authorized by its charter held a rule of property as to the rights of the city in the land.—Union Ry. Co. v. Chickasaw Cooperage Co., Tenn., 95 S. W. Rep. 171.

38. CRIMINAL TRIAL—Appeal and Bail.—Where a judgment admitting a person charged with capital offense to bail recited a notice of appeal by the state when the judgment was rendered, the appeal was taken within the 30 days required by Crim. Code 1896, § 4316.—State v. Sikes, Ala., 41 So. Rep. 777.

39. CRIMINAL TRIAL—Confessions.—It is for the circuit judge to pass upon the admission of confessions made by a prisoner and he must determine whether the same are made freely and voluntarily.—State v. Perry, S. Car., 54 S. E. Rep. 764.

40. DEEDS—Competency of Grantor.—Although one be the subject of an insane delusion, he is not on that account incompetent to make a deed or will, unless the delusion extends to the subject out of which the conveyance grew, and thus affected his business capacity.—Reese v. Shutte, Iowa, 108 N. W. Rep. 525.

41. DEPOSITIONS—Certificate of Notary.—It is unnecessary that the notary public taking testimony *de bene esse* should certify that he is not attorney or counsel for either party.—Rouse, Hempstone & Co. v. Sarratt, S. Car., 54 S. E. Rep. 757.

42. DIVORCE—Decree for Alimony.—In an action for divorce or alimony, a decree requiring the husband to pay a gross sum as alimony, and making it a lien on his real estate, does not become dormant because no execution was issued thereon for more than five years from the decree.—Peeke v. Fitzpatrick, Ohio, 78 N. E. Rep. 519.

43. ELECTIONS—Contest.—A *de facto* deputy county auditor held not disqualified from receiving and caring for the returns of an election at which he was voted for for auditor while in charge of the auditor's office so as to deprive himself of the benefit of a recount of the ballots in the event of a contest.—Murphy v. Lentz, Iowa, 108 N. W. Rep. 530.

44. ELECTION OF REMEDIES—Suit to Restrain Locating Highway.—Owner of land held not estopped by his conduct with reference to an appeal from the commissioners from proceeding in injunction suit to restrain locating highway.—Johson v. Town of Clontarf, Minn., 108 N. W. Rep. 521.

45. EMINENT DOMAIN—Wrongful Taking of Land.—An owner of land which the authorities are proceeding to take for a public highway without compliance with the statute and the constitution with reference to damages may enjoin the proceedings.—Johson v. Town of Clontarf, Minn., 108 N. W. Rep. 521.

46. EQUITY—Following Statute of Limitations.—Courts of equity will generally by analogy apply the statute of limitations in any case where the remedy in equity is concurrent only or substitute for an action at law.—People v. Michigan Cent. R. Co., Mich., 108 N. W. Rep. 772.

47. ESTOPPEL—Inconsistent Positions in Litigation.—Where defendant set up the validity of a contract in a subsequent action between the parties, defendant could not be heard to say that the contract was not enforced.—Galt v. Provan, Iowa, 108 N. W. Rep. 760.

48. ESCROWS—Performance of Conditions.—Bank with which vendor of land deposited deed held not required to deliver the deed without surrender of the bond for title, or a showing that it was not in any event enforceable against the vendor.—Hardin v. Neal Loan & Banking Co., Ga., 54 S. E. Rep. 755.

49. EVIDENCE—Judicial Notice.—The court, in considering the demurrer to a pleading to collect taxes, held not entitled to take judical notice of records for the purpose of contradicting allegations in the pleading.—People v. Michigan Cent. R. Co., Mich., 108 N. W. Rep. 772.

50. EVIDENCE—Parol Modification of Written Contract.—Where a contract required plaintiff to model a statute "as per photographic illustration," parol evidence was inadmissible to show a different contemporaneous agreement.—Bounani v. White Bronze Monument Co., Iowa, 108 N. W. Rep. 524.

51. EXECUTORS AND ADMINISTRATORS—Accounting.—In accounting by administratrix, held that she was chargeable with the personalty which came into her hands, and entitled to credit for uncollectible assets legitimate losses, and sums properly paid out.—*In re* Davis' Estate, 100 N. Y. Supp. 349.

52. EXECUTORS AND ADMINISTRATORS—Action by Heir to Recover Property.—In an action by an heir to recover of a former executor certain bonds alleged to be wrongfully withheld by defendant from the estate, evidence examined and held insufficient to show that decedent was the sole owner of such bonds.—Gerting v. Wells, Md., 64 Atl. Rep. 298.

53. EXECUTORS AND ADMINISTRATORS — Proceedings to Vacate Probate.—On a caveat to the appointment of the executor named in a will, evidence held insufficient to support a charge that he had been guilty of fraud in his transactions with the testatrix.—*In re* Berry's Estate, N. J., 64 Atl. Rep. 186.

54. FACTORS—Advancements. — In an action by the owner of hops againt the pledgee from a factor for conversion, the burden is on the pledgee to show the amount advanced on the faith thereof.—Beken v. Kingsbury, 100 N. Y. Supp. 323.

55. FIRE INSURANCE—Clear Space Clause.—A fire insurance company has no authority to attach to the policy a clause by which the insured warrants the maintenance of a designated clear space about the insured premises.—Wild Rice Lumber Co. v. Royal Ins. Co., Minn., 108 N. W. Rep. 871.

56. FIRE INSURANCE—Knowledge of Agent.—Knowledge of an insurance agent as to the ownership of property not shown to have been obtained in the course of the agency held not imputable to defendant.—Continental Ins. Co. v. Cummings, Tex., 95 S. W. Rep. 48.

57. FRAUD—Evidence.—In an action for fraud practiced by a vendee on the vendor, whereby land was conveyed for an inadequate consideration, the evidence held sufficient to sustain a finding that defendant's representations were false and fraudulent.—Jones v. Coan, Ala., 41 So. Rep. 757.

58. FRAUD—Laches.—The equitable doctrine of laches does not apply where an action is brought at law for

damages caused by a contract fraudulently procured.—Neibuhr v. Gage, Minn., 64 Atl. Rep. 884.

59. GUARANTY—Affirmance.—Where one guaranties a contract relying on fraudulent reprsentations, after knowledge that they were fraudulent, voluntarily gives a note and mortgage to secure his liability, it was an affirmance of the guaranty and a waiver of any fraud.—Emerson-Newton Implement Co. v. Cupps, N. Dak., 108 N. W. Rep. 796.

60. GUARDIAN AND WARD—Burden of Showing Legal Incapacity.—In an action by a guardian to set aside a deed executed by his ward, plaintiff has the burden of proving the ward's legal incapacity to make the conveyance.—Reese v. Shutte, Iowa, 108 N. W. Rep. 525.

61. GIFTS—Parol Gift of Land.—In trespass to try title based on a parol gift together with possession and improvements, evidence held to show only a gift of the cultivated part of the tract.—Wallis v. Turner, Tex., 95 S. W. Rep. 61.

62. HIGHWAYS—Road Duty.—The payment of street taxes in an incorporated town or city is a substitute for the performance of road duty, and one is not liable to both for the same period.—Taylor v. State, Ala., 41 So. Rep. 776.

63. HOMESTEAD—Void Contract of Sale.—A contract by a husband for the sale of the homestead of himself and wife is void, and an action against him for damages for its breach cannot be maintained.—Silander v. Gronna, N. Dak., 108 N. W. Rep. 544.

64. HOMICIDE—Evidence.—In a prosecution for murder, when defendant claimed self-defense, testimony by deceased's son as to the purpose with which he approached defendant after deceased was shot held not admissible.—Maroney v. State, Tex., 95 S. W. Rep. 108.

65. HUSBAND AND WIFE—Conveyance Before Marriage.—Where no negotiations or engagement for marriage were pending between plaintiff and her husband at the time he executed a conveyance of certain of his property to his son, such conveyance was not fraudulent as to plaintiff.—Beechley v. Beechley, Iowa, 108 N. W. Rep. 762.

66. HOMICIDE—Indictment and Information.—An indictment for homicide by pushing deceased into a pond, where he was drowned, held not fatally defective for failure to allege that the pushing was done by defendant with a design to effect deceased's death.—State v. Barrington, Mo., 95 S. W. Rep. 235.

67. INFANTS—Defense of Infancy.—The defense of infancy held personal to the infant, and unavailable to the infant's assignees or privies in estate.—Riley v. Dillon & Pennell, Ala., 41 So. Rep. 768.

68. INJUNCTION—Right of Striking Employees to Issue Circulars.—Striking employees of a publishing company held entitled to send out circulars setting forth the circumstances of the strike and requesting their friends to withdraw their patronage.—Butterick Pub. Co. v. Typographical Union No. 6, 100 N. Y. Supp. 292.

69. INJUNCTION—State Board of Education.—Equity will not restrain acts of state board of education at suit of taxpayer whose interest is small, unless the acts are clearly beyond the powers of the board.—Duncan v. Heyward, S. Car., 54 S. E. Rep. 760.

70. INTOXICATING LIQUORS—Action on Bond.—In an action on a liquor dealer's bond, the burden of proving good faith, founded on a belief that the minor to whom liquor was sold was of age, held on defendant.—Farr v. Waterman, Tex., 95 S. W. Rep. 65.

71. INTOXICATING LIQUORS—Sale to Minor.—If defendants had good reason to believe and did believe that the buyer of liquor was of the age of 21 years, the defendants should be acquitted.—People v. Bronner, Mich., 108 N. W. Rep. 672.

73. JUDGMENT—Equitable Relief.—In order to set aside a judgment for fraud, complainant must prove that he had a meritorious defense which could be established by evidence on another trial, and that there was no negligence on his part.—Collier v. Parish, Ala., 41 So. Rep. 772.

73. JUDGMENT—Non Obstante Veredicto.—In an action against a physician, where the evidence does not conclusively show that respondent had authority to operate upon the left ear of his patient, and that no damage resulted, it was error to order judgment for defendant notwithstanding the verdict.—Mohr v. Williams, Minn., 108 N. W. Rep. 818.

74. JUDGMENT—Right of Attorney to Confess Judgment.—A warrant of attorney to confess judgment in favor of a particular person described therein gives no authority to confess judgment in favor of another person.—Rasmussen v. Hagler, N. Dak., 108 N. W. Rep. 541.

75. JUSTICES OF THE PEACE—Certiorari.—The only question reviewable on *certiorari* to a judgment in a proceeding before a justice to recover for violation of a health ordinance is whether the court had jurisdiction of the parties and the subject-matter.—Board of Health of City of Woodbury v. Cattell, N. J., 64 Atl. Rep. 144.

76. LANDLORD AND TENANT—Damages for Failure to Irrigate.—The measure of damages in an action by a lessee for failure of the lessor to furnish water to irrigate the land to raise a crop determined.—Dunlap v. Raywood Rice Canal & Milling Co., Tex., 95 S. W. Rep. 43.

77. LANDLORD AND TENANT—Lease.—A contract between a landlord and a tenant, that the tenant might occupy the premises after the expiration of an existing lease, but containing no agreement on the part of the tenant to occupy the premises after the expiration of the lease, held unilateral.—Glessner v. Longley, Ga., 54 S. E. Rep. 753.

78. LANDLORD AND TENANT—Surrender of Possession to Stranger.—A tenant of buildings on land held under a lease by another party does not, by accepting a lease of the land from a stranger without the consent of his landlord or the lessee, place the stranger in possession so as to enable him to maintain an action to quiet title.—Trimble v. Lake Superior & Puget Sound Co., Minn., 108 N. W. Rep. 867.

79. LIFE INSURANCE—Estoppel Affecting Forfeiture.—Insurer in a life policy held estopped from claiming a forfeiture for nonpayment of a premium.—Carey v. John Hancock Mut. Life Ins. Co., 100 N. Y. Supp. 289.

80. LIMITATION OF ACTIONS—Specific Performance.—The statute held not to run against an action by the purchaser for specific performance of a contract of sale of land, he being in possession.—Phillips v. Jones, Ark., 95 S. W. Rep. 164.

81. MARRIAGE—Common-Law Marriage.—On an issue as to a common-law marriage, declarations of the alleged husband not in the presence of the wife are admissible to disprove the marriage.—Topper v. Perry, Mo., 95 S. W. Rep. 203.

82. MASTER AND SERVANT—Contract of Employment.—The privilege of a sewing machine company employing a salesman to dissolve the contract held not to apply to machines which the salesman had purchased for resale in his exclusive territory.—White Sewing Mach. Co. v. Shaddock, Ark., 95 S. W. Rep. 143.

83. MASTER AND SERVANT—Defective Appliances.—Where an ordinary ladder furnished to a servant is sound, no duty thereafter rests on the master to inspect the same from time to time.—Dessecker v. Phœnix Mill Co., Minn., 108 N. W. Rep. 516.

84. MASTER AND SERVANT—Federal Regulation.—Cars held not used for interstate traffic at the time an employee was injured, within the meaning of the federal statute relating to the defense of assumed risk.—Coley v. Kansas City Southern Ry. Co., Tex., 95 S. W. Rep. 96.

85. MASTER AND SERVANT—Injury to Servant.—Where a master directs his employee to deliver goods on the premises of another, he is not responsible for the safety of the premises or appliances of his customer.—De Maries v. Jameson, Minn., 64 Atl. Rep. 880.

86. MASTER AND SERVANT—Injury to Servant.—Where plaintiff while laying defendant's gas mains in trenches

was injured by a horse falling into an unguarded trench, the question of defendant's negligence was for the jury. —Johnson v. St. Paul Gas Light Co., Minn., 108 N. W. Rep. 816.

87. MASTER AND SERVANT—Negligence of Fellow Servant.—Negligence of a brakeman on a train on which intestate was employed in signaling the engineer to proceed while intestate was between two cars coupling the air hose held negligence of intestate's fellow servant for which the railroad company was not liable.—Louisville & N. R. Co. v. Vincent, Tenn., 95 S. W. Rep. 179.

88. MASTER AND SERVANT—Safe Place to Work.—That a servant who complained of the danger arising from the appliances was a foreman did not place him outside of the class of persons to whom a master owes the duty of exercising reasonable care in providing a safe place to work.—Viou v. Brooks-Scanlon Lumber Co., Minn., 108 N. W. Rep. 891.

89. MORTGAGES—Enforcement.—The holder of a note secured by deed of trust held not estopped from foreclosing the lien.—Harwell v. Harbison, Tex., 95 S. W. Rep. 30.

90. MORTGAGES—Redemption.—Proof of heirship of one entitled to redeem from foreclosure of a mortgage executed by his ancestor held sufficient proof of the right to redeem without the production of any document or record.—Lightbody v. Lammers, Minn., 108 N. W. Rep. 846.

91. MUNICIPAL CORPORATIONS—Use of Street for Private Purposes.—A municipal corporation held not empowered to grant to private citizens the right to lay in a public street water pipes to be used for private purposes. —VanDuyne v. Knox Hat Mfg. Co., N. J., 64 Atl. Rep. 149.

92. NEGLIGENCE—Injury to Servant.—An apprentice nurse employed by a hospital association is a servant entitled to the same degree of care which a master is required to give to any inexperienced servant.—Hewett v. Woman's Hospital Aid Assn., N. H., 64 Atl. Rep. 190.

93. NEGLIGENCE—Malpractice Causing Increase of Injury.—That before suit brought for injuries caused by negligence plaintiff has settled a claim against his attending physician for malpractice does not relieve defendant of liability for its original negligence.—Viou v. Brooks-Scanlon Lumber Co., Minn., 108 N. W. Rep. 891.

94. NEGLIGENCE — Questions for Jury. — To entitle plaintiff in an action for negligence to have the case submitted to the jury, it is only necessary that the evidence be sufficient to support a finding in his favor, and the weight and sufficiency of the evidence is for the jury.—Hewett v. Woman's Hospital Aid Assn., N. H., 64 Atl. Rep. 190.

95. OFFICERS—De facto Officers. — Contestant having performed the duties of a deputy auditor after having been orally appointed and taken the oath, he was an officer *de facto*, though he was not appointed in writing and did not file a bond as required by Code, § 481.—Murphy v. Lentz, Iowa, 108 N. W. Rep. 580.

96. PARENT AND CHILD—Contributory Negligence of Parent.—A parent is required to exercise that degree of care for the safety of the child which a reasonably prudent person ordinarily exercises under the same or similar circumstances.—Mattson v. Minnesota & N. W. R. Co., Minn., 108 N. W. Rep. 517.

97. PARTITION—Wife as Party to Deed.—A partition deed of community homestead property signed by a husband and wife held not defective because the wife's name did not appear in the body of the deed as grantor. —Brown v. Humphrey, Tex., 95 S. W. Rep. 23.

98. PARTNERSHIP—Apparent Authority of Partner.—A carrier, not having known that the person to whom it delivered goods had been a partner of the shipper, held not able to defend its unauthorized delivery on the ground of apparent authority.—Adrian Knitting Co. v. Wabash Ry. Co., Mich., 108 N. W. Rep. 706.

99. PARTNERSHIP—Suit Against Firm.—Where a bill was against a partnership and service had on one, complainant was entitled to amend by converting the suit to one against the partners individually and striking out the names of those not served. Code 1896, § 40.—Levystein v. Gerson, Seligman & Co., Ala., 41 So. Rep. 774.

100. PAYMENT—Application.—A shipper of cotton held to have had a right to apply the proceeds of a certain shipment to the payment of a note given for advances. —Kempner v. Patrick, Tex., 95 S. W. Rep. 51.

101. PAYMENT—Recovery of Voluntary Payment.—A tenant knowingly paying as rent an amount exceeding that actually due cannot recover the excess from the landlord.—Connerly v. Inman, Ark., 95 S. W. Rep. 188.

102. PLEADING—Copy of Account.—Copy of an order for the delivery of a threshing machine outfit accepted by the seller for a fixed price on which certain payments have been made is not a copy of an account within Rev. Codes 1899, § 5282.—Hanson v. Lindstrom, N. Dak., 108 N. W. Rep. 798.

103. PLEADING—Inconsistent Defenses.—Where defendant gave notes for fertilizers sold under a void contract, he was not estopped by his plea of payment by the execution of such notes to counts based on a *quantum valebat* to deny the validity of the contract.—Boyett v. Standard Chemical Oil Co., Ala., 41 So. Rep. 756.

104. PRINCIPAL AND AGENT—Burden of Proof.—In an action by an alleged principal to recover from his agent an over-payment for a stock of goods, an instruction held not error as misplacing the burden of proof.—Bargman v. Brown, Tex., 95 S. W. Rep. 39.

105. PRINCIPAL AND AGENT—Right to Revoke Power. —The donor of a power held entitled to revoke the same during a period during which it provided that it should be irrevocable, subject only to liability for damages sustained by the donee.—Kilpatrick v. Wiley, Mo., 95 S. W. Rep. 213.

106. PRINCIPAL AND SURETY—Acts Constituting Discharge of Surety.—A transaction between a shipper of cotton and a factor who had made advances to him held not to have released the shipper's sureties.—Kempner v. Patrick, Tex., 95 S. W. Rep. 51.

107. PROPERTY—Proof of Ownership.—Proof of ownership of property subject to taxation as of a date named is not proof of ownership as of dates one or two years previous.—Gibson v. Clark, Iowa, 108 N. W. Rep. 527.

108. PUBLIC LANDS—Mortgages.—A mortgage executed by the purchaser of school lands before he had completed the three years occupancy created a lien on the land, enforceable against the succeeding purchaser, after he had completed and made proof of the requisite occupancy.—Harwell v. Harbison, Tex., 95 S. W. Rep. 30.

109. RAILROADS—Injury to Cattle.—Where an owner of cattle negligently permits them to stray on the track, the railroad company is not liable for injury unless it failed to use ordinary care to avoid the accident after discovering them.—Cummins v. Great Northern Ry. Co., N. Dak., 108 N. W. Rep. 798.

110. RAILROADS — Injury to Trespasser. — A railroad company held liable for negligently injuring deceased, though a trespasser, if he was in the exercise of ordinary care, and the railroad company could have discovered her presence in a dangerous situation by the exercise of ordinary care.—Brown v. Boston & M. R. R., N. H., 64 Atl. Rep. 194.

111. RECEIVERS—Mechanic's Liens.—On a sale of property in the hands of a receiver, subject to a mechanic's lien, the lien claimants were entitled to have their lien preserved as to the proceeds, and to priority of payment over general creditors.—Baldwin v. Spear Bros., Vt., 64 Atl. Rep. 235.

112. RECORDS—Registration of Title to Land.—Any person owning land, whether his title be of record or not, may maintain proceedings under the Torrens act to register his title.—National Bond & Security Co. v. Anderson, Minn., 108 N. W. Rep. 861.

113. REFORMATION OF INSTRUMENTS — Mistake. — A grantor of certain lands held not entitled to a decree reforming her deed for mistake as against subsequent *bona fide* purchasers from the grantee.—Brown v. Gwin, Mo., 95 S. W. Rep. 208.

114. SALES—Breach of Conditions.—Where a mare was sold under a conditional contract reserving the title in the seller, the latter on the buyer's default was entitled to recover the mare from a purchaser of the buyer without offering to place either *in statu quo*.—Riley v. Dillon & Pennell, Ala., 41 So. Rep. 768.

115. SALES—Damages.—The face or *prima facie* value of a promissory note at any point of time held the principal with the interest then accrued, not including unearned interest, though in form added to the face of the note.—Robertson v. Moses, N. Dak., 108 N. W. Rep. 788.

116. SALES—Place of Contract.—Where a merchant orders goods of a merchant in another state, who there accepts the order and delivers the goods to a carrier for transportation to the buyer at the latter's expense and risk, the sale is made in the state of the seller.—P. J. Bowlin Liquor Co. v. Beaudoin, N. Dak., 108 N. W. Rep. 545.

117. SPECIFIC PERFORMANCE—Installation of Waterworks System.—A contract for the installment and maintenance for a long term of years of a waterworks system with fire hydrants may be specifically enforced in equity.—Hubbard City v. Bounds, Tex., 95 S. W. Rep. 69.

118. SPECIFIC PERFORMANCE—Pleading.—In an action for specific performance of a contract for the sale of land, petition held not to show facts depriving the vendee of the right to delivery of the deed on tender of payment.—Hardin v. Neal Loan & Banking Co., Ga., 54 S. E. Rep. 755.

119. SPECIFIC PERFORMANCE—Unconscionable Contract.—A contract for the sale of land held not so hard and unconscionable that equity would refuse to decree specific performance.—Kilpatrick v. Wiley, Mo., 95 S. W. Rep. 218.

120. STREET RAILROADS—Injury to Pedestrian.—A pedestrian about to cross two street car tracks on which two cars are rapidly approaching in opposite directions, must exercise reasonable care to avoid being struck.—O'Brien v. St. Paul City Ry. Co., Minn., 108 N. W. Rep. 805.

121. TAXATION—Assessing Real Property.—In assessing real property the assessing agency is not concerned with physical values, except as evidence of physical conditions, nor specially concerned with franchise value; all being valued as a unit by adding together the separate values of the elements.—Chicago & N. W. Ry. Co. v. State, Wis., 108 N. W. Rep. 557.

122. TAXATION—Presumption of Truth as to Taxpayer's Return.—The presumption of truth arising from a taxpayer's sworn return of his property cannot be overcome by mere surmise that property has been omitted therefrom.—Gibson v. Clark, Iowa, 108 N. W. Rep. 527.

123. TAXATION—Tax Sale.—Where lands have been sold for taxes and the purchaser perfects his title thereunder, the state cannot impeach such title by a resale of the land for taxes due for prior years.—Gates v. Keigher, Minn., 108 N. W. Rep. 860.

124. TENANCY IN COMMON—Purchase of Tax Title.—The rule inhibiting the assertion of any adverse tax title by one co-tenant against another is based upon a community of interest rendering it inequitable to permit one of the parties to do anything to the prejudice of the other.—Hoyt v. Lightbody, Minn., 108 N. W. Rep. 843.

125. TRESPASS TO TRY TITLE—Action by Heirs.—A widow and children of a deceased owner held entitled in trespass to try title to recover land of which he died seised subject to a judgment in favor of a purchaser from the administrator of deceased for the value of improvements made thereon.—Fowler v. Agnew, Tex., 95 S. W. Rep. 86.

126. TRUSTS—Construction of Will.—Where testator declared that it was his "wish and desire" that, if his wife should receive proper respect from testator's daughter and her family, the wife should appoint them as beneficiaries of a portion of the income of a trust, such clause did not create a trust for the benefit of his daughter and her children.—Homes v. Dalley, Mass., 78 N. E. Rep. 513.

127. TRUSTS—Constructive Trusts.—A party to a contract in relation to the lands of a decedent's estate held to have acquired no rights superior to those given him under the contract by purchasing the lands at an administrator's sale.—Howard v. Brown, Mo., 95 S. W. Rep. 191.

128. TRUSTS—Existence of Trust.—One who located a certificate of land under contract to procure patent in the name of another, who should hold one-third of the land for his benefit, held to have acquired equitable title to one-third of the land.—Morris v. Unknown Heirs of Hamilton, Tex., 95 S. W. Rep. 66.

129. TRUSTS—Property Purchased With Money of Another.—Where S used plaintiff's money with money of his own to purchase property in his own name, he became a trustee for plaintiff as to that portion of the property purchased with plaintiff's money.—Waterman v. Buckingham, Conn., 64 Atl. Rep. 212.

130. VENDOR AND PURCHASER—Bona Fide Purchaser.—A grantee and those deraigning title through him held put on inquiry, which would lead to knowledge, by the joinder in the deed of one having no record title, but who had given a mortgage which was recorded.—Creel v. Keith, Ala., 41 So. Rep. 780.

131. VENDOR AND PURCHASER—Bond for Title.—Vendor of land held not required to execute deed till title bond is surrendered by the vendee or it is shown not in any event to be enforceable against the vendor.—Hardin v. Neal Loan & Banking Co., Ga., 54 S. E. Rep. 755.

132. VENDOR AND PURCHASER—Rights Under Oral Sale of Land.—Where a purchaser of town lots entered on the property as pointed out by the vendor's agent and made improvements, he was entitled to claim the benefit in equity of a parol sale of the lots occupied, although the deed executed by the principal conveyed other lots.—Wright v. Isaacks, Tex., 95 S. W. Rep. 55.

133. VENUE—Prejudice of Judge.—A judge to whom an application for a change of venue on the ground of his own prejudice is presented has no discretion to deny the same.—State v. Dabbs, Mo., 95 S. W. Rep. 275.

134. VENUE—Residence of Defendant.—Where a defendant answers and goes to trial without urging his plea of privilege to be sued in the county of his residence, the plea is waived.—Karner v. Ross, Tex., 95 S. W. Rep. 46.

135. WATERS AND WATER COURSES—City Water Charges.—One receiving water from a city held entitled to require the city to charge for the water received in same inclosure, as if it had been supplied through a single meter instead of through several meters.—Scovill Mfg. Co. v. Kilduff, Conn., 64 Atl. Rep. 218.

136. WILLS—Undue Influence.—Mere acquiescence by beneficiaries of a will in the purpose of one exercising undue influence on testator for such beneficiaries' benefit is sufficient to invalidate the will.—Cowan v. Shaver, Mo., 95 S. W. Rep. 200.

137. WITNESSES—Contradictory Statements.—Where a witness gave testimony tending to show that act of accused was in self-defense, evidence of his statements that accused shot deceased for nothing held inadmissible.—Watson v. State, Tex., 95 S. W. Rep. 115.

138. WITNESSES—Cross-Examination.—Where plaintiff sued defendants alleging a conspiracy in an exchange of land, there was no error in permitting the defendants on cross examination of plaintiff to show his various experiences in real estate transactions.—Kolbe v. Boyle, Minn., 108 N. W. Rep. 847.

139. WITNESSES—Impeachment.—The fact that the solicitor for the state in a criminal case recalled witnesses for defendant in order to lay a predicate for impeachment did not make them the state's witnesses.—Hammond v. State, Ala., 41 So. Rep. 761.

140. WORK AND LABOR—Right to Recover for Labor Performed.—Where, in an action on special and common counts for services under a contract, the contract is not proven, the jury may under the common counts allow plaintiff the reasonable value of the services.—Richards v. Richman, Del., 64 Atl. Rep. 238.